Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

CARLOS SEGURA AND JUAN A. GARCIA,
Petitioners,

v.

TEXAS DEPARTMENT OF HUMAN SERVICES, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Are all fixed rules, including the rule of law, inapplicable to "Indian" versus White' issues? Does it matter whether we are considering *individuals* versus an "Indian" Group? What is the status of descendants of the autochthonous People in Texas who simply never, until now and here, got over having the fear of death or other grievous harm stop them from, in any way, acting counter to Whites'' wishes? And, at what point does an "Indian" lose that "incompetent "ward" of the Whites" legal status so as to thereupon merit treatment as an equal of Whites? Was the ***Johnson v. MI'ntosh***, 21 U.S. (8 Wheat.) 503 (1823), 5 Law. Ed. U.S. 18-21 WHEATON 5-8, ruling that, as to "Indian" People, these are White "Courts of the Conqueror," meant to permit, as was the result below, Whites to decide all these issues in complete exclusion of all "Indian" input until all present day descendants of "Indian" People should become White and only thereupon become *entitled* to equal treatment under law in South Texas?

1. Is the legal status of the descendants of "Indian" People in South Texas under the United States Constitution still properly determined, exclusively by Whites, in reliance upon the 1823 determination of the United States Supreme Court in *Johnson* that Whites, through the White government and these "courts of the conqueror," can dictate all rights of "Indian" People, now as individuals, until they should become White so as to, in this way, complete extermination of "Indian" groups?

2. Can the White Defendants, knowing that Whites in South Texas, to the exclusion of "Indian" People control government, invidiously devise and execute a

plan which intentionally harms the Plaintiffs because of their "Indian" race background and the recognition that the Whites in control of the Judiciary will not permit scrutiny which countermands the *Johnson* holding that only Whites can exercise judgement that impinges on "Indian" and White welfare?

PARTIES TO THE PROCEEDING

Petitioners

Petitioners are **CARLOS SEGURA** and **JUAN A. GARCIA**, each respectively proceeding as an individual descendant of "Indian" People and not as members of any federally recognized group of "Indian" People nor representative of the latter in any way other than because of actual descent therefrom. The Petitioners are members of the People autochthonous to South Texas and Northern Mexico here for many centuries prior to arrival of the European Immigrants. Petitioners take strenuous exception to being identified as "***His***-panic" because such is a insidious destruction of actual identity such as here complained of and would thus, as was done below, respectfully complain of any "***His***-panic" participant in these proceedings. Petitioners furthermore respectfully but, of necessity, openly, affirm here that Creator God, contrary to the official White position, did not create Whites with *superior* endemic human attributes than "Indian" People.

Respondents

Respondents are all descended of European Immigrants or their progeny whom were in prior years self-described as Whites, with the exception of Investigator **PHILLIP V. JONES**, who is nevertheless of African (Black) Immigrant origin. They include the upper echelons of the **TEXAS DEPARTMENT OF HUMAN SERVICES** (hereinafter "TDHS"); **MICHAEL MASON**; **DEBORAH BILLA**; **GENEVIEVE MANLEY**; **CYNTHIA J. HAHN**; **TIMOTHY REZNICEK**; **DOLORES TORRES**; **J.M. LINDSEY**; and, **KAREN B. LINDSEY**. The binding precedent holds that Whites are "superior" in inherent human

attributes over "Indian" People like the Petitioners and no White person to this point addressing this cause below has any problem with such precedent. The Respondents would here gladly accept and continue to exploit the express recognition once more by the Supreme Court that "Indian People," as a group, are *inferior* in endemic human attributes than Whites.

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OPINIONS BELOW

Because no other court has written on the issues, the dispositive opinion here is that of the Memorandum And Recommendation Of United States Magistrate Judge (Appendix C, 11a.) as "ACCEPTED in its entirety" by the District Court.(Appendix B, 9a.) The Fifth Circuit affirmed on April 24, 2002 and its entire contribution on the merits here consists verbatim of the following:

"Having reviewed the parties' briefs in light of the record excerpts and applicable authorities, we affirm for essentially the same reasons contained in the magistrate judge's report, as approved by the district court."

The Fifth Circuit issued its denial on Petition For Rehearing on May 20, 2002.(Appendix A, 2a.)

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its Opinion on Motion For Rehearing on May 20, 2002, and the Petition for Writ of Certiorari has now here been timely filed. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1)and 2106.

CONSTITUTIONAL PROVISIONS INVOLVED

All the provisions of the Constitution of the United States of America are involved here because the issue is whether any, all, or none, of those provisions apply *to descendants* of "Indian" People as the precedent is clear that Whites alone determine which, if any, apply to "Indian" People as groups. If all "Indian" People have to become White prior to any treatment as equal under the law of

Whites, then none of the provisions of the United States Constitution apply to "Indian" Groups and the remaining question is does it apply to the Petitioner descendants of "Indian" People here simply because they refuse to become White?

STATEMENT OF THE CASE

The position of the Petitioners is straight forward: European Immigrants and their progeny (Whites) came into what to them was the "New World," usurped all Native "title" in property even as they developed their own (*Johnson*, at pgs. 604-605.) expressly premised upon derogation by Whites of any rights in Petitioners' "Indian" Ancestors. For the reasons here set forth, Whites are now in the process of completing extermination of the said "Indian" People, through exclusive of "Indian" People control of these "Courts of the Conqueror." That is the basis of not only the discrimination here at issue, but also, the rulings of the lower courts, premised upon the further precedent that only this Court can set aside its own precedent. The Magistrate Court, acknowledging her strong emotional dislike of the Petitioners' assertions, recommended dismissal, as accepted by the District Court, because she, without elaboration, found that the District Court was "not the proper forum to address plaintiffs' historical claims of racism and oppression."(Appendix C, p.14a.) Mirroring the Supreme Court's proclaimed inability to accommodate justice, fairness, or the rule of law, in an "Indian" versus White Controversy,[1]

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[1] The critical precedent of this Honorable Supreme Court clearly is to the effect that regardless of how "extravagant the pretension of converting the discovery of an inhabited country into conquest may appear," when faced of against those autochthonous

the Magistrate merely discards, for all purposes, all the Petitioners' factual assertions about White racism and oppression, (*Id.*, at 13a.) and with the actual Background thus arbitrarily reduced to what the Whites self-interestedly approve, fails to find the elements of any cause of action of which the assertions on race constitute a critically necessary part.

The Magistrate Court resolves the fact issues in the Whites' favor at the beginning of her putative, but fictitious, "Factual Background." But there is no application of rules involved. She merely ascertains that "TDHS [so] determined," (*Id.*, at 15a.) and Petitioner's input, because it is "Indian" input, is thereby once again summarily ruled irrelevant. There is absolutely no inductive reasoning, or, objective demonstration that some fact, found inescapably established by evidence, leads unavoidably to establish the element/s missing. Instead, openly acknowledging herself in the place of the White Defendants, as has been done by Whites in South Texas historically, she interprets the icon titles exactly as the White Defendants merely say they did.[2]

People from whom we usurped all premised upon their failure to measure up in comparison to us Whites, "if it be indispensable to that system under which the country has been settled" "it may, perhaps be supported by reason, and certainly cannot be rejected by Courts of justice" in the United States. (*Johnson* p. 591-92.)

[2] It is necessary, not only to assume White benevolence as a matter of course and *good faith* here, in order to so conclude, but to completely ignore all the Petitioner's assertions because the Petitioners know, and affirm, that it was a *frame-up* of Mr. Segura all the way through. The dispositive White Conclusion is simply that the White perspective must, in accordance with Johnson v. M'Intosh, as a matter of law, prevail!

It is not a matter of application of anything but some mental process which, according to Whites, is found in Whites and which, all those *lesser humans* whom happen to be other than White and autochthonous to this area, just are *incompetent* to attain and exercise. The reason is disparity of Creator God's favor towards the "Indians," the Whites would, by mere implication now maintain.[3]

Thus, in a state teaming with un-asserted (i.e., not *federally* "recognized") "Indians" but no "Indian" representation in any position of advantage in anyway controlled by government, the Defendant White Competitors for the proverbial ladder up the TDHS Hierarchy, on February 9, 1999, thought they had the perfect means of deflating the challenge presented to them by Supervisor Segura, the only potential competitor with impeccable credentials and reputation anywhere in TDHS to openly recognize himself as of "Indian" descent. It came in the form of a phone call from Dolores Torres (approvingly recognized by the Magistrate Court as a "Mexican-American," Appendix C, 58a.) somehow inferring creation of the titles here at issue

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[3] *Johnson*, p. 573. *See also*: *The Medieval And Renaissance Origins Of The Status Of The American Indian In Western Legal Thought*, Robert A. Williams, Jr., 57 S. Cal. L. Rev. 1, 1983, where the little more than five hundred year old development of jurisdictional concepts over North America in the New World is described at length, through: Absolute Roman Catholic Church dominion; Exclusive Pope invested Spanish hegemony; Contests by other *wanabe* European Conquerors; and, ultimately on to the formal adoption in the "Marshall Trilogy" of cases discussed herein below, picked up by the Robert N. Clinton and Margaret Tobey Hotopp article, *Judicial Enforcement Of The Federal Restraints On Alienation Of Indian Land: The Origins Of The Eastern Land Claims*, 16 Mine L. Rev. 17 (1979), pgs 19 - 38.

(*Id.*, at 15a & 16a) through implications, later proven to be wrong, that Supervisor Segura had either participated in creating them or had sanctioned their creation. Both Petitioners, Supervisor Segura and Worker III Garcia, were summarily punished, Segura by demotion and Garcia by three day suspension without pay the first time he was punished. When the evidence in an administrative hearing disclosed the Whites' error in factual evaluation of the matter (*Id.*, 17a.), rather than admit error, TDHS turned around and once again focused blame on Petitioner Garcia, because, they now asserted, even though they had already punished him for his "wrong," he had "lied" to TDHS Supervisors.[4]

Once again, the ultimate conclusion is reasonably impossible to reach, unless all Petitioner's input into the issues is simply but completely ignored, as was done here by the Magistrate Court. Furthermore, it would now be impossible for the White Defendants to support the conclusion of the Magistrate Court without disclosing their intentional abuse of this system controlled by the Whites, leading the Magistrate Court to foreseeably conclude that she has the same right, without voicing it, that Chief Justice Marshall had in *Johnson v. M'Intosh*, to rule to favor the Whites because that was whom he was indebted for his existence as Chief Justice to. The Magistrate does a marvelous job of filling in the huge gaps in *the story* being here told by the Whites with conclusions in the place of all "Indian" input summarily thrown out because "Indian" People are deemed not

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[4] *See*, Appendix C, p. 17a, where the Magistrate concludes Petitioner Garcia --- "recanted." The *characterization* of the Magistrate as a "recantation" is also part of the subject of another related suit making its way up through the courts below where Petitioner Garcia complains of a TDHS failure to rehire.

competent to interfere with the way the White Immigrant Society wants to eradicate the *use of race* in the United States by exterminating the remaining "Indian" People. This last objective is to be attained by yet further judicial fiat on strictly White terms eventually denominating what is left with some generic prescription of the term and its definition once again applied to all the people of the Western Hemisphere. Petitioner Garcia was, in this context, once again punished summarily, this time by summary dismissal.(*Id.*, at 68a.)

The only reasonable explanation for these results below – because the lower courts have gone out of their way to be intentionally cryptic about the basis of their actions – is that the Supreme Court's precedent in *Johnson v. M'Intosh* (*Supra*) is, as it has always been, still interpreted to mean nothing less than that White Immigrants into what is now the State of Texas can, in absolute fashion, completely disregard any rights in "Indian" People, and, since Petitioners are, and openly claim to be, "Indian," their status requires (in accordance with the *Johnson* precedent) the lower courts to disregard the rights of the Petitioners here by affirming that the Petitioners have no right to testify in contradiction of Whites, as was actually brought about by the lower courts in this case. *If* "Indians" can not testify against Whites (or contrary to White declarations dispositive of factual disputes) it follows that TDHS, as was actually accomplished in this case, without bothering with the Petitioner's "Indian" input, was correct to alone and summarily "***determine***" the whole and entire matter of the "titles" here at issue. Since the White Defendants, with the use of their In-House Counsel, knew this, they knew that should it come to that, the Trial Courts would have to *throw out all inconsistent with White factual assertions of the "Indian" Party* and resolve the case consistent with the White Version of the case, as was actually

done in putative compliance with the Supreme Court Precedent of *Johnson v. M'Intosh*.

REASONS FOR GRANTING THIS WRIT

Other than the omnipotence of White power over the "Indian" People because they militarily bested them,[5] the only other (although oblique and without "Indian" input) assertion for the propriety of the dismissal below is that the courts lack subject matter jurisdiction.[6] This position however, is directly contrary to the prior holdings of this Court[7] because the legal

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[5] *Johnson v. M'Intosh*, (*Supra*); ***Cherokee Nation v. Georgia***, 30 U.S. (5 Pet.) 1 (1831); and, ***Worcester v. Georgia***, 31 U.S. (6 Pet.) 515 (1832). This "Marshall Trilogy" of cases together with the Court created doctrine of "plenary power" (*Infra.*) establish omnipotence towards "Indian" People in Whites.

[6] The development of White ("Western") *Jurisdictional* concepts developed through a better than five hundred year metamorphosis consistent with the legal precedent and starting with absolute Roman Catholic Pope authority, through disclaimers by European Leaders of that faith and thus also of the Catholic Pope's authority, and on to the United States of North America, are set forth in the authorities in Footnote 3 above and its accompanying text. This development is critically instructive here because it also reflects the development recognized and adopted by the U.S. Supreme Court in the Marshall Trilogy of Cases.

[7] The right of review exists for Whites in these circumstances as recognized where the U.S. Supreme Court held that the Nebraska State Court's determination that Respondent *Boyd* therein "was a subject of Great Britain and Ireland [] involved the denial of a right or privilege under the constitution and laws of the United States, upon which the determination of whether *Boyd* was a citizen of the United States or not depended, and jurisdiction to

situation of the Petitioners in South Texas has never been directly addressed. Nevertheless, through the Marshall Trilogy of cases, the Supreme Court established that "Indian" People are *inferior*[8] "incompetent 'wards'" of the White People, whose entire existence is thus dictated by Whites. The self-serving interpretations of the mad with hunger for land *Texians* does not, however, support the lower courts now extending the Supreme Court's precedent to arrive at the ultimate destination which the Whites openly assumed was theirs to pursue in the distant past. The focal point of what has always been the White Immigrants' policy remains: the final and complete extermination of "Indian" People so as to thereby *clear title* to the entire territory. Such is to be accomplished now only by this Supreme Court of the United

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review a decision against such right or privilege necessarily exists in this tribunal." ***Boyd v. State of Nebraska***, 143 U.S. 135,160 (1892).

[8] The Judicial acceptance of these factual and legal assertions of Whites is so profound and pervasive that it precisely follows White <u>*development*</u> of White–exclusive of "Indian" People–government and judicial adjudication, *Johnson v. M'Intosh*, *Supra*. It it is thus not reasonable to dispute that U.S. Courts have created, or brought about, a system where "Indians" have to tender Whites "satisfactory proof of fitness for civilized life" before being considered equal to Whites, as was established in ***Elk v. Wilkins***, 112 U.S. 94, 100 (1884), 5 Sup. Ct. Rep. 41, and has been judicially crafted into the "plenary power" of Whites over "Indian" People, ***Lone Wolf v. Hitchcock***, 187 U.S. 553 (1903); ***Oliphant v. Suquamish Indian Tribe***, 435 U.S. 191 (1978). That this, by Whites proclaimed and imposed, "inferiority" underlies these Judicial conclusions and effects is well recognized. *See*; History of Public Land Law Development, written for the United States Public Land Law Review Commission by Paul W. Gates (1968-U.S. Gov. Printing Office, Lib. of Cong. No.: 68-62999," Chapter 2, p. 33.).

States of North America denying this Writ Application so as to thereby support of their White *Brethren* in South Texas.

The result is inescapably that of elimination of the rule of law in favor of a rule by Whites. To accomplish this, the lower courts hold that — not only do the *Texian* Whites have *plenary power*[9] over "Indian" People, as is the case elsewhere in the U.S. — they alone, as Whites, can determine the point of time and circumstance whereupon any individual descendant of "Indian" People becomes White.[10] The *Texians* can therefore now extract whatever tribute they should wish, including absolute acceptance and adherence to the Whites' policy of extermination of "Indian" People. And should the *Texians* deem it proper to, once again, revert to outright physical extermination, the Constitution, this case's precedent would arguably hold, presents no impediment thereto, unless the Whites in control of the White Government should deem it properly so.

And, it is the undisputed complaint of Petitioners herein that this White omnipotence over "Indian" People has been now used in South Texas for one hundred and seventy-

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[9] ***United States v. Kagama***, 118 U.S. 375 (1886) and *Lone Wolf, Supra,* reflect the development of the plenary power doctrine, while, ***Tribal Business Committee v. Weeks***, 430 U.S. 73 (1977), while to the same effect, does hold that the legislative power of Congress is not immune from judicial scrutiny.

[10] The precedent of *Elk v. Wilkins, Supra,* that even "Indian" intent to become a citizen (before "citizenship" was, for other purposes *given* to "Indian" People by Whites) under the Constitution requires an affirmative or positive acceptance by the United States before the actual status as an "Indian" is affected, is still binding.

nine years to deny equal under law treatment to all whom should still openly claim any affinity with "Indian" People. Furthermore, none of the factors described by such as commentator Kenneth W. Johnson in his discussion of "collective naturalization"[11] applies in Texas. Here the White Immigrants from the U.S. simply agreed with the White Immigrants from Spain, through Mexico, and after the *Johnson* decision, that it was all a matter of could the U.S. Immigrants oust the "Mexicans" and their pretensions under the Discovery Doctrine recognized in the Marshall Trilogy as the law ratifying all disregard of "Indian" rights as has been done here ever since.

Without clarification of the law and procedures in regard to *identity* as here at issue, the definition of when an "Indian" becomes White, and thus, "civilized" enough to thereupon *merit* equal to Whites treatment under the law remains in the despotic hands of "competitors" of all such persons as the Petitioners here. Under these applications of White Rule, the Magistrate's effective conclusion that, should the Petitioners catagorize a storage icon: "Evidence that Whites are wrong, 'Indians' have rights too," and someone found to assert offense at such, TDHS could prosecute and punish said "Indians" to their arbitrarily *determined* whim because, after all, the law pronounced by this Supreme Court

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[11] Kenneth W. Johnson, *Sovereignty, Citizenship And The Indian*, 15 Ariz. L. Rev. 973, 993-997 (1973). It must be noted that "tacit consent" of the *recognized* "Indian" (*Id.*, at 997) does not apply where *Texians* never recognized the "Indian" People of Texas but instead have killed, removed, or held a gun to their head (figuratively speaking) until this last and present generation, which still produces the consequences which Petitioners are afflicted with here, as intentionally imposed by the White Defendants and the White Lower Courts!

says, according to the lower courts here, that all whom assert any non-White affinity with "Indian" People have no rights thus now expanding the scope of *Johnson v. M'Intosh*, *Supra*, previously applicable only to "Indian" Groups. Since "Indians" have no right even to contradict White versions of factual occurrences, any reasonably competent lawyer, or equally sophisticated and experienced person, can devise the planned execution of the *frame-up* undertaken against Petitioner Segura here. It is thus irresponsible and absurd to the extreme to expect humans to fight one another for survival, and the economic means thereof, without availing of all advantage at their disposal as actually happened here. That is what "government" is all about! It was absence of that, after all, and with all possible excuse and deference to the patriotic Magistrate, which is the evil which the White Immigrants into "Texas" committed in their blinding hunger for the "Indian" People's land and resources.

By allowing the rulings on subject matter jurisdiction below to exist, the confusion as to "race" being here created will be humongous. From now on, it will not be a matter of such definition having anything to do with color, place of origin, blood quantum, Ways of Life, or cultural practices, etc., but rather simply what the Whites say it is! "Race" our world community is coming to understand, has nothing to do with anything that is distinct about human beings but just what reflects the necessity which the White People immigrating here confronted in putatively *legitimizing* their existence and actions in their "New World." The White Immigrants came, found it necessary to invent the concept of "race" to understand their *Mother* Countries' power grabs over the Autochthonous and explain their own actions as they thereafter undertook to supplant the *Mother* Countries' power. Now, the only way to avoid the incongruity of a proclaimed society under-girdered with the rule of law as to Whites, but,

with the rule of Whites, as to "Indian" People, is to complete extermination of those whom it has always excluded. To leave the "Indian" in place risks precisely this complaint here made, and, (the reason why the Honorable Magistrate was so *put off so horribly by Plaintiffs' assertions below*) ultimately, to subvert the very foundations upon which this whole State of Texas was established!

Although the reasoning of the White Lower Courts is never set forth openly,[12] the only basis upon which such finding of lack of subject matter jurisdiction could have been arguably premised is the White developed historical notion that treatment of "Indian" *Groups*[13] is an area of concern for the Legislative Branch of the federal government alone. (***Oneida Indian Nation v. County Of Oneida***, 414 U.S. 661 (1974)-"Oneida I". But there is no "Indian" Group involved in this case, but rather two *individual* descendants of "Indian" People! And the *Texians* did not make any treaty with local "Indian" People, nor does the defeat of that other European

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[12] The District Court simply proclaims incredulity at the Petitioners' "...belief that White people throughout history have taken the land of the Indian people. This objection is frivolous. Additionally, Plaintiffs have not shown that they have standing to litigate claims on behalf of all living or deceased Indian people [...nor...] jurisdiction to hear such claims." (Appendix B, p. 6a.)

[13] ***Cherokee Nation v. Georgia***, 30 U.S. (5 Pet.) 1 (1831); ***Worcester v. Georgia***, 31 U.S. (6 Pet.) 515 (1832). In the latter case, Georgia law was preempted by the "government-to-government" relationship between "Indians" and the Federal Government. "The whole [sovereign-to-sovereign] intercourse between the United States and this [Cherokee] nation, is, by our constitution and laws, vested in the government of the United States." (*Id.*, p. 561.)

Invader (the country of Mexico) even start to address the issue of the Autochthonous People's rights!

Even the "history" told by the "Conquerors" can no longer hide the gross distortions of the "American" past made by one sided telling of the story. And many aspects of the story of what actually happened are no longer disputed amongst experts in the relevant fields. For example; the experts now agree that there has been a gross undercount of the autochthonous People exterminated or displaced by the arrival and actions of the Europeans in the Americas. Between 1496 and 1535 (while there was still at least debate as to whether the Catholic Pope's grant of North America to Spain was binding on Britain, etc.) "the population of Hispaniola [in the Caribbean went] from eight million" to where "by 1535, say the leading scholars on this grim topic, 'for all practical purposes, the native population was extinct.'"[14] And the most misrepresented and distorted story of all is the one still being lied about pertaining directly to "Texas."

The infamy of "the Alamo" is the story still being purveyed by the *Texians*. This can be readily understood when what is now taught in High School History is taken into perspective. The *Texians* came here for the land and the lies advanced intentionally by such as the Daughters of the Republic of Texas simply accentuate the high stakes in the *perceptions* here at issue. There was nothing "heroic" about the Immigrants' actions here. For our purposes, it is important to note that the Spanish did believe in the Pope's ultimate authority over the "pagan" Native People to the point

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[14] David E. Stannard, *The Conquest Of The New World, American Holocaust*, © 1992, pgs. 74 & 75, citation omitted.

where Columbus instituted the *repartimiento* (literally "dispersing out of") the "Indian" People themselves. (Stannard, *supra*, p. 73, *see also generally*, pgs 57 to 75.) Thus, by the time, three hundred years later, that the White Immigrants from the U.S. were coming here to fight the White Immigrants from Mexico for the land, even those "of [Spanish Conquistador] Cortes's Tlaxcala Indian allies"[15] whom had helped conquer the Mexchica-Aztec People, had become themselves slaves of the Spanish.

As stated by Albert A. Nofi about the "Mexican Army" which the "heroic" *Texians* defeated; they were primarily "Indians" as were most of the People then populating what has now become 'Texas." In *The Alamo and the Texas War for Independence*, (© 1994), Nofi reports of the provision of troops for the battle with the U.S. Immigrants at the Alamo that: "On one occasion a [Mexican] recruiting officer wrote to a senior officer [en route to do battle with the Gringos at the Alamo], 'Here are 300 volunteers. I will send you 300 more if you return the chains'." (*Id.*, p. 194.) It is even more descriptive of the actual events being in the nature of an inexorable tide of White Immigrants running over the docile "Indian" People in their way because the law could only rationalize the results in retrospect once the catastrophic results of the Marshall Trilogy had come about.

Furthermore; as shown explicitly in *Texas by Terán, The Diary Kept By General Manuel De Mier Y Terán On His 1828 Inspection Of Texas*, Edited by Jack Jackson, © 2000, the Europeans were creating a desperate scramble for survival by the Autochthonous, and, the European Immigrants coming

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[15] Peter Winn, *Americas, The Changing Face of Latin America and the Carribbean*, © 1993, pgs. 33 - 45.)

into San Antonio from the North-East were focused only upon their "competition" for hegemony over the territory so as to make a claim viable under the Discovery Doctrine. Thus, the native "Indian" People, this Honorable Supreme Court had already told the U.S. Immigrants in *Johnson*, were irrelevant to the whole issue and it was just a matter of ousting the European Immigrants coming here from the South in order to thus establish the basis of their own claim under the Discovery Doctrine. Ever since, the *Texians* have killed "Indians" left and right with impunity and they have never seen fit to change their previously avowed pronouncement that none were to reside within the "Texas" which they were constructing exclusively for Whites. This situation still exists alive and well in South Texas today.

And "Texas" is precisely the setting for our most recent developments under the results historically described above. It is thus inescapable but to conclude that the Magistrate Court is a brilliant lawyer, it is just too bad for the Petitioners that there is absolutely no doubt but that she is on the side of the Adversary Whites! This is so because she managed to dismiss the Petitioner's cause without any evidence as to the ultimate fact of ***icon title characterization***! In a case where the issue was whether the White Defendants had intentionally and falsely set up TDHS Supervisor Segura to be charged with participating in creation of the icon titles which were, TDHS argued, "inappropriate," etc. somehow; the Magistrate concluded that, even though the TDHS factual assumptions as to Supervisor Segura's participation were established to be erroneous, the Defendants nevertheless acted in good faith because they had so somehow "DETERMINED" (Appendix C, p. 15a.) that he had so acted. How can they have been wrong in their putative factual assertions of Supervisor Segura's participation in creation of the icon titles yet be accorded *qualified immunity*

by the Trial Courts for intentionally avoiding to ask him about their putative suspicions directly? It is here that the Honorable White Magistrate's commitment exclusively to the White Cause as mandated by the *Johnson* case is patent because the Judicial falsehoods being affected break out of her carefully constructed paradigm.

IT IS STILL WHITE RULE BEING AFFECTED:

The State of Texas has never withdrawn or nullified its opposition to absolute exclusion of "Indian" People participating in its government. Even though the lower courts bandy about the "frivolous" nature of Plaintiffs' claims (Appendix B, p. 6a.) the only discussion is directed at the fact that the Petitioners had not shown that "they have standing to litigate claims on behalf of all living or deceased Indian people...."(*Id.*) The Trial Court than does exactly what the Magistrate Court has done, which is to *construe the facts without consideration of the Indian" input*!(*Id.*)

Furthermore; the White Defendants do not take issue with the factual declarations of the Plaintiff which are supported by the Supreme Court authority here set forth. The lower courts do not discuss them nor take issue with the eminent logic thereof in view of the Supreme Court precedent expressly recognizing such. The only logical and evidentiary possibility supported below is that always present adherence of all White People establishing and maintaining the White Government in Texas to the dictate of this Honorable Supreme Court in the Marshall Trilogy. A mandate that eliminates the need for White Immigrants from the U.S. rushing Westward to acquire as much of the territory as they can before the Spanish or French or other Europeans should beat them to it and to not even bother and consider the interests of the people autochthonous to this area of Mother

Earth in doing so. There has here therefor been no dispute of the fact that these are White Courts upholding a White System of Government because that is what this Honorable Court ruled the case to be in the Marshall Trilogy.

The District Court's reaction to what it characterizes as an absurd assertion that "the[Petitioners] contend a cause of action exists under 42 U.S.C. § 1982 based on their belief that White People throughout history have taken the land of the Indian people" flies in the face of the Supreme Court precedent in the Marshall Trilogy. The lower courts know that it is this Honorable Court's proclamations of the law which are the supreme law of the land. Thus, they could have said nothing other than that if this Court rules that all "Indian" Groups are without even that minimum status that permits them to present testimony or adduce a story or background which controverts that of any White, or Whites, they are obliged to go along with it. They have no option to not adhere to the law as this Supreme Court states it!

> "However extravagant the pretension [] if the principle has been asserted in the first instance, and afterwards sustained [] it becomes the law of the land, and cannot be questioned. [] However this [limitation of "Indian" Groups' rights] may be opposed to natural right, and to the usages of civilized nations, yet, if it be [found] indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and **certainly cannot be rejected by Courts of justice**." (*Emphasis Added, Johnson, Supra*, p.591-92.)

The Supreme Court in *Boyd v. State of Nebraska, Supra*, note 7, undertook exhaustive discussion of the means by which "naturalization [may be] effected by act of congress, by treaty, or by the admission of new states" (*Id.*, at 169.) and it is patent that none of such potential avenues of collective naturalization apply here. This is the law as set forth by the Supreme Court and thus binding upon the lower courts because it was the Supreme Court interpretation in the Marshall Trilogy which *determined* "Indian" People "incompetent" to obtain title to the land which the White Courts were then developing in Whites. Furthermore, as the discussion on *Boyd* shows, all the legal precedent is premised upon some "volitional" act which is reasonably, at least, construed by Whites to have been acceded to by some form of *representation* at the least! Finally, this discussion by the Supreme Court, as is always reflected in the precedent, allows no one to forget that, in the end, the rule of law is for the Whites but always "excepting Indians not taxed." (*Boyd, Supra*, at . P. 174.)

The recognition that those "Mexicans" remaining in Texas after the 1848 treaty of Guadalupe Hidalgo between the United States and Mexico are bound by that Treaty is because the "Mexicans" were represented by their government!" By remaining in Texas they, at least arguably agreed to become U.S. and Texas citizens. But the very heart of the Marshall Trilogy is that "Indian" People are not such as to, after 1823, challenge the U.S. White Immigrants into what becomes the State of "Texas" in any legal way as was done by the "Mexicans." And the reality is clearly set forth in all Supreme Court precedent that "Indian" People are not like Mexicans or Frenchmen, or other Europeans, with whom the White People developing U.S. Government reached agreement that "Indian" People were *inferior* and thus not equal to Whites. It is only here and now and in this instant lawsuit that the assertion of

"Indian" rights has for the first time ever, been reasonably raised under the circumstances here now presented.

From both, all the precedent available, as well as the fact (regardless of how the Trial Court and its Magistrate danced around the issue) that no "Indian" People are represented in this present White Government, the judiciary of which is here being addressed, it follows, again, as a matter of indisputable logic that "Indian" People are not treated equal under law to Whites in South Texas. How can there ever be any "Indian" People in White Government if "Indian" People are by the law of the land made "incompetent 'wards'" of the Whites? And this is especially the fact in Texas where the U.S. Immigrants came in here blazing away after their experience in developing the United States forty-seven years earlier was topped off with an official proclamation by the Upper Most Exponent of the Supreme Law of the Land, that "Indian" People mattered not in the least in the results of the White Immigrants' *competition* for hegemony over the "Indian" Land and resources, including "Indian" People!

It is, after all, the direct expounding of the law of the land by the Supreme Court in *Johnson* that establishes, because of the erroneous White determination that "Indian" People are inferior to Whites in inherent human attributes, that "Indians" must be relegated to whatever exercise of judgment the Whites should benevolently accord them. And Whites in Texas have never to the very present accorded any, as evidenced here by the refusal of anybody in the TDHS named White Defendants or, in the White Courts below, to so much as accord any *consideration* in the critical *determinations* here at issue. If mere creation of the term "Rudy's Naughty Box" is to be made an offense after the fact here, without the least consideration of the Petitioners' input,

only because they self-identify as "Indian," why is not such done by established rule rather than by *ad hoc* determination of the White Competitors of "Indian" People? This is arbitrary as to Petitioners. "It is arbitrary for only "Indian" People to be summarily punished by Whites whose determination includes even the nullification of the inherent power of a Supervisor Segura, as happened here, where, were he to have been White, it would have been fully recognized. It is arbitrary that only Whites could here determine the moral, ethical, and/or by society permitted character of the words "properly" used on such as the icon titles here. It is arbitrary where it is even later thereafter, again determined by a White-exclusive of "Indian" People Judiciary, that circumstances in this case merit the Whites here complained of being found to escape liability for the results intentionally brought by them because the White Judiciary concludes, again in accordance with their ever faithful adherence to the Johnson precedent, that Whites in the position of the Defendants here can rely upon the Judiciary throwing out the "Indian" testimony on the issues as was actually done here. It is arbitrary to ignore the "Indian" Side of any story without any consideration but instead resolve these disputes premised upon that recognition of superior inductive reasoning that Johnson says Creator God acknowledged inherently in Whites but specifically deprived the "Indian" People of. And, finally, this reality being in effect creates a responsibility upon this Honorable Court to where there is no alternative but to so openly declare the situation, formally! It is White Rule alone that exists for "Indian" People in Texas!"

It is thus this Honorable Supreme Court of the United States of North America that must decide the case! This is not such as what has been interpreted to be "a political issue" of whether the U.S. Congress should deal in a given way with some "Indian" Group. The question is whether the White

Defendants, and now the lower U.S. Courts, have properly and officially set out the precedent in this case clearly dictating for all those who, like lawyers, are knowledgeable in these matters, that individual Whites can now officially themselves *determine*, in *ad hoc* fashion, whether the claim of a un-recognized "Indian," in any White versus "Indian" controversy, is benevolent, or, just permissible, and thus palatable to and consistent with the White master-plan to usurp all that the "Indian" People once had.

This master-plan is that articulated in the Marshall Trilogy and its progeny. It entails through *Hook or Crook* establishing a Beachhead, as was done by the Whites originally in the Jamestown area. Of course, the agreement by all the European countries interested in exploiting or otherwise colonizing the New World is determinative of nothing with respect to the "Indian" People and the Whites themselves so saw this situation.[16] Even pursuant to what these "Western" Countries call the International Law, the only thing that imposes the White Immigrants' power upon the "Indian" People is the power of their military. It is a Might Makes Right world at that point and nothing else.

When the Whites start coming in to become *Texians*, there is, as established by their own very failure to recognize the Hegemony claimed by the "Mexicans" to adequately make a claim under the Discovery Doctrine, no effective *discovery*,

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[16] *See* discussion of Queen Elizabeth not accepting "the claim that those [the Lands of the New World] had been donated to the King of Spain by the Pope, whose authority to invest the Spanish King with the New World as a fief she does not recognize" in the article by Robert A. Williams cited at Footnote 3 above. If the Pope's "donation" was not binding upon the British Queen, why would it have ever been binding upon the "Indian" People?

or even, possession and control, so as to constitute an effective claim to the land that Europeans need recognize and thus, the "Indian" People autochthonous to the area now called Texas are simply like any other human beings in the world at the time albeit much less aggressive and assertive. It is in this situation that this Honorable Supreme Court (1) officially pronounces the "Indian" People irrelevant to the *Texians'* hunger for "Indian" land acquisition, (2) permits the White Government to institute the "Removal" Policy of the Cherokee Nation of "Indian" People after the latter two-thirds of the Marshall Trilogy which results in the infamous "Trail of Tears," and, (3) in cases like that of the 1892 *Boyd* Case (*Supra*) determines that "no denial of the elective franchise, or of any other right, [shall be denied by the new State of Nebraska or others] to any person, by reason of race or color, **excepting [as to] Indians not taxed**."(*Id.*, at 174, Emphasis Added.) It is this Judicial Precedent which sets the context within which White Government in Texas treats the Petitioners here.

Thus; however much the Patriotic sentiment of the Honorable White Magistrate and District Courts below might cause them to get offended at the horrible story of Whites these Petitioners have to tell here, the fact is that they have to tell it because it is true and there is nothing the Whites in control and, regardless of military might, can do other than once again leveling the weapons and again start firing to kill all surviving "Indian" People in order to avoid it being told. Because, be told it must be, because the result is to Judicially coerce conversion into Whites of all the remaining surviving "Indian" People. THAT is genocide! And that it be "told" is here distinct from that it be, by the Whites in control, *accepted*! While it may be correct to say that the Autochthonous human being inhabiting the Americas and wiped out largely by Whites were not as *advanced* or

sophisticated in terms of development of theories of government in such as written constitutions, (or, "lawyering" so to speak) there is no longer doubt but that it was from the Autochthonous from whom the Whites were first introduced to concepts of democracy and egalitarianism, etc. It is thus also clear that a "contribution" to humanity of some sort is possible by "Indian" People should they survive here, and the conclusion by Whites, that all "Indian" People are superfluous should not, in this day and age, be lightly reached.

THE JUDICIAL EXTERMINATION OF THE "INDIAN" PEOPLE:

There is nothing spectacular about recognizing what is happening here. "Proving" exactly that such is going on to an adverse and hostile White Judiciary may well be most difficult but recognizing that the attempt of necessity undertaken by your Petitioners here will be met with this most hostile and violently opposed militancy by the White Trial Courts is entirely foreseeable. That is the same exact sentiment at work in the White Competitor Female Supervisors of Petitioner Segura here. And it most certainly is the exact same sentiment that the Autochthonous faced when confronted with the *Texians* here to take the land and resources, along with the rights, of the Autochthonous in order to establish their own title thereto. It is survival of the fittest, reward for enterprise and initiative, etc., however it be rationalized, it is the way the Whites have told the story thus far.

And that story that Whites continue to tell entails: First of all, an *inferior* and *shunned* by Creator God People. Secondly, it entails a people autochthonous to the Americas which the White Immigrants, in order to rationalize their own

"title" to the land then being developed and its resources, officially proclaimed "incompetent 'wards'" of the Whites in *Johnson*. Thirdly, it entails a putatively inferior People which the Whites must retain contained in the Reservations as they may otherwise be out here without acknowledging the White superiority upon "abandoning" the Reservation and then get to learn, as the Petitioners here have (which is what really makes them a danger to the White Hegemony), that it is nothing more than the knowledge and understanding of what Whites have done to manipulate the *story being told* that has given them such enormous power over the life and existence of the Autochthonous! Finally; it entails the Whites maintaining an exclusive of "Indian" People Government, and, in particular a Third Branch of Government as the Judiciary constitutes in the United States, to manipulate, under the dictate of the Marshall Trilogy, the entire set of definitions and constraints upon all adjudication of disputes involving "Indian" People in the resultant society.

That is precisely what took place here. The White Defendants know and, at all times here relevant knew, that there was no evidence that Supervisor Carlos Segura had actually participated in the creation of the icon Titles at issue. They furthermore should have known, and know now, that the titles themselves are a legitimate and proper means of communication under the U.S. Constitution. That is, they know that to be the case if descendants of "Indian" People, such as the Petitioners, are entitled to equal protection under the rule of law in South Texas. But they also knew, from being in control and exercising absolute power over "Indian" People, like the Petitioners, since the 1823 decision in *Johnson,* that the White Courts in places like South Texas are nowhere near ready to accord the Petitioners equal to Whites treatment under the rule of law.

And so the TDHS Defendants knew that they did not have any evidence of Supervisor Segura's complicity in the, by them, invidiously described violation of some unknown rule[17] but they also knew that simply leveling of the charges would destroy that "All American" reputation which Supervisor Segura then had in spite of an open and notorious identity with, and commitment to Raza, or, "Indian" People, in the local vernacular, which the White Courts' outright rejection below nevertheless renders such–as to Whites–non-existant! In the end, however, what made it a worth while risk from the White Defendants' perspective, in 1999, to take, was the realization that the law of the land just did not recognize any rights in "Indian" People as has here now proven to be the case. The White Defendants knew this and planned on it, and, the Magistrate Court delivered consistent with their expectations.

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[17] The one rule supposedly providing the basis of Defendant Manley's actions to demote and fire Petitioners is "TDHS Work Rule 4710, §§ B-4 & B-12" (Appendix C, p. 66a.; *See*: Record On Appeal at pgs. 863 to 864.) which states nothing more than that: "An employee is expected to maintain conduct that does not interfere with the proper performance of duties, office operations, or DHS goals and objectives" and which includes a general admonition against "willfully or negligently damag[ing], destroy[ing], misuse, los[ing], or hav[ing] unauthorized possession of owned or leased state property" and all of which is impliedly (but erroneously) concluded to have been violated by Supervisor Segura after these White TDHS Defendants here summarily and invidiously *removed* the power and authority which a White Supervisor similarly situated would have enjoyed until constitutionally deprived thereof. There is absolutely nothing here that precludes labeling a location for storage of miscellaneous items by Rudy Alvarez on a TDHS Computer by Juan A. Garcia, as done on February 8, 1999, with "Rudy's Naughty Box."

IT IS TODAY'S RULING IN THIS CASE WHICH WILL EXTERMINATE "INDIANS":

The end result for all reasonable persons here and in the beginning of the 21st century is that there is no justification for Whites to have proclaimed their Blacks *free* and themselves egalitarian, freedom loving, adherents of the rule of law and of pronounced and pervasive opposition to tyranny and despotism, while yet maintaining the Autochthonous in abject slavery and destitute of all rights and freedom in the land proclaimed to be that *of the free*! There is even less reason to be happy about what the present situation in "Texas" presently is. The only reason to even argue the case for "Indian" People inferiority, in law if not in fact, is that the Whites' entire creations (government, laws, reputation, etc., etc., ad infinitum) in the United States are based thereon. We all now know that, as human beings that they are, the Autochthonous were no less imbued with equal attributes of human beings by Creator God than any other race. The question before the Court here is whether this society can continue to permit the Judicial Precedent to proclaim a condition all to the contrary thereof.

It must be noted herein that whether Congress imbues a political status or right upon "Indian" Groups (thus far no authorization for legislative dictation of an individual's legal status and character has been attempted and it is Petitioner's position that such would itself be unconstitutional) will nevertheless not alter the nature of the respective "Indian" persons affected. That is; that Congress should say openly that "Indian" People are still not practicing their "religion" as Whites approve, and, have yet to learn how to really appreciate the White knack for accomplishing or attaining the archaic notion of *civility* does nothing to change the reality of an "Indian" who does not agree with the implied exceedingly

positive self-assessment of the Whites. Even the greatest Majority of the well on their way to being "civilized" in the eyes of Whites Cherokee People removed from Georgia and Florida have preferred to stay on the Reservation to maintain their culture and Way of Life, rather than in Georgia so as to become a rich and influential Converted "Indian."

That the Honorable Supreme Court of the United States denying writ here might delay the time of Whites' dealing with these issues will not change the fact that all of us here familiar with the facts, as well as posterity, will know that Whites here used their exclusive control over the judiciary to permit these still virulently racist Whites in Texas to escape with yet another in a long and continuous line of racist abuse of the Autochthonous. And that Whites have developed the judicial expertise to oppress here through previous exclusion of "Indian" People no more *justifies* the abuse now than it would be to argue that the Tiano People were justly exterminated by Whites simply because they were vulnerable:

> "They ... brought us parrots and balls of cotton and spears and many other things, which they exchanged for the glass beads and hawks' bells. They willingly traded everything they owned.... They were well-built, with good bodies and handsome features.... They do not bear arms, and do not know them, for I showed them a sword, they took it by the edge and cut themselves out of ignorance. They have no iron. Their spears are made of cane.... They would make fine servants.... With fifty men we could subjugate them all and make them do whatever we want. Howard

Zinn, *A People's History Of The United States*, © 1980.

So can this fine generation of White Magistrates grossly Out-Lawyer the comparatively still shooting arrows at Modern Warfare Armored Tanks Petitioners herein. But that does not make the "Indian" People any less equal in human attributes to Whites in reality, and extermination by these Judicial means is nevertheless *extermination* and thus genocide. Finally; it must be noted that it is not only "Indian" People who are losing here, it is the one pronounced and pervasive commitment by all the Justices of the Supreme Court over the two hundred and thirteen years that expires hereby: for the rule of law is indeed nothing more than a political platitude should the rulings below stand and in its place, the modern Courts will have allowed the lower courts to have placed the White Race as now the rulers, over their own subservient People, in the stead of the law. The Petitioners respectfully submit that the cost of allowing the White Competitors here to grab the jobs being disbursed by the State of Texas the way the State of Oklahoma once disbursed land to Whites is anathema to all those most cherished values the Supreme Court Justices over the years proclaimed themselves to be working at preserving for the benefit of all of the "American" People!

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari in this case should be granted!

Respectfully submitted

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 01-50539

[Filed May 20, 2002]

Carlos Segura; Juan A Garcia Plaintiffs-Appellants	)
v.	)
Texas Department of Human Services; Michael Mason; Debora A. Billa; Genevieve Manley; Cynthia J Hahn; Timothy Reznicek; Philip V Jones; James Doe, One; James Doe, Two; Dolores Torres; J M Lindsey, in his individual and official capacity; Karen B Lindsey, Individual and official capacity Defendants - Appellees	)

Appeal from the United States District Court
for the Western District of Texas, San Antonio

ON PETITION FOR REHEARING

Before DAVIS, BENAVIDES and CLEMENT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ _____
United States Circuit Judge

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil No. SA-00-CA-229-OG

[Filed March 19, 2001]

Carlos Segura and Juan A. Garcia,
Plaintiffs,

v.

The Texas Department of Human Services, et al.,
Defendants.

ORDER

Pending before the Court are Defendants' Partial Motion to Dismiss Claims brought pursuant to 42 U.S.C. § 1983 (Dkt. # 44); Defendant's Partial Motion to Dismiss Claim brought pursuant to 42 U.S.C. § 1982 (Dict. # 43); Motion to Dismiss or for Judgment on the Pleadings of Defendant J.M. and Karen Lindsey with respect to claim brought pursuant to 42 U.S.C. § 1982 (Dkt. # 88); Motion to Dismiss or for Judgment on the Pleadings of Defendants J.M. and Karen Lindsey with respect to claims brought pursuant to 42 U.S.C. § 1985(2) (Dkt. # 89); Defendants' Motion to

Dismiss Claims brought pursuant to 42 U.S.C. § 1985(2) (Dkt. # 56); Defendants' Motion for Judgment on the Pleadings, and for Summary Judgment based on Qualified Immunity (Dkt. # 92); and, Defendants' Motion for Judgment on the Pleadings, or in the Alternative, for Summary Judgment, with respect to Title VII allegations (Dkt. # 95). No responses have been filed to these dispositive motions, with one exception. Plaintiffs did file a response to Defendants' Motion for Judgement on the Pleadings, and for Summary Judgment based on Qualified Immunity (Dict. # 93).

Also pending before the Court is the Memorandum and Recommendation of United States Magistrate Judge (Dkt. # 105) and Plaintiffs' objections thereto, titled "Objection to Current Unfair Slaughter of Native Women and Children in the Guise of Yet Another Supposedly Impartial White Woman Judge's Memorandum and Recommendation (Dkt. # 110).

Where no party has objected to the Magistrate Judge's Memorandum and Recommendation, the Court need not conduct a de novo review. In such cases, the Court need only review the Memorandum and Recommendation and determine whether it is either clearly erroneous or contrary to law. *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir. 1989), *cert denied*, 492 U.S. 918 (1989).

On the other hand, if any party objects to the Memorandum and Recommendation, the Court must review those portions of the report de hove. *See* 28 U.S.C. § 636(b)(1) (a judge of the court shall make a de novo determination of those portions of the report or specified proposed findings and recommendations to which objection is

made); *see also Kreimerman v. Casa Veerkamp S.A. de C.V.*, 22 F.3d 634, 646 (5th Cir. 1994), *cert.denied*, 513 U.S. 1016 (1994). Such a review means that the Court will examine the entire record and make an independent assessment of the law. **The Court need not, however, conduct a de novo review when the objections are frivolous, conclusive, or general in nature.** *Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

In this case, Plaintiffs' objection is a 32-page diatribe about the war between the White and Indian people, and how the Magistrate Judge's recommendation is simply part of the White Conspiracy. The only statements which are remotely recognizable as objections are: (1) statements regarding the taking of Indian land by White people, which Plaintiffs believe support a cause of action under 42 U.S.C. § 1982 (Plaintiffs' objections, pp. 16-18); (2) statements regarding Plaintiffs' self-identification as "Raza" and "Indian" (Plaintiffs' objections, pp. 19-21 and affidavit of Carlos Segura); and, (3) statements regarding the Magistrate Judge's conclusion that it would have been impossible for the defendants to have conspired to interfere with plaintiffs' fights in this case prior to the filing of the complaint (Plaintiffs' objections, pp. 26-27). Attached to Plaintiffs' objections is an affidavit of Carlos Segura, which does mention a few of the factual issues addressed in the recommendation. To the extent the statements in the affidavit provide any new evidence, the Court will consider same. *Freeman v. County of Bexar*, 142 F.3d 848, 853 (5th Cir. 1998). However, many of the statements in the affidavit are simply argumentative, redundant or conclusory and do not provide any new evidence to support Plaintiffs' claims.

42 U.S.C. § 1982

As noted by the Magistrate Judge, 42 U.S.C. § 1982 is intended to bar racial discrimination in the sale or rental of property. The protection afforded by the statute does not extend to employment discrimination claims.[1] In Plaintiffs' objections to the memorandum, they do not dispute this conclusion. Instead, they contend a cause of action exists under 42 U.S.C. § 1982 based on their belief that White people throughout history have taken the land of the Indian people. This objection is frivolous. Additionally, Plaintiffs have not shown that they have standing to litigate claims on behalf of all living or deceased Indian people who they believe suffered from discrimination throughout the years, nor have they shown that the Court has jurisdiction to hear such claims. This is a lawsuit based on adverse employment decisions, and although Plaintiffs attempt to use this forum to continue their "war," the Court must focus solely on the issues relevant to Plaintiffs' employment. Plaintiffs' objection is overruled.

42 U.S.C.§ 1985(2)

Plaintiffs further object to the Magistrate Judge's conclusion that it would have been impossible for the defendants to have conspired to interfere with plaintiffs' rights in this case prior to the filing of the complaint (Plaintiffs' objections, pp. 26-27; recommendation, p. 22). Again, Plaintiffs turn to their belief that the "White Conspiracy" has historically excluded Indian people from all part of government, and they believe this "exclusion" satisfies the

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[1] *See* citations in the memorandum. (Dkt. # 105, p. 17 n. 74).

statutory requirement for "conspiracy" under 42 U.S.C. § 1985(2). However, Plaintiffs offer no facts to support a claim that *these Defendants* conspired to obstruct justice or interfere with *Plaintiffs'* participation in any legal proceedings. Plaintiffs' objection is frivolous and unsupported by any evidence.

42 U.S.C. § 2000e / 42 U.S.C.§ 1981 / 42 U.S.C. § 1983

A. Exhaustion of administrative remedies:

Although Plaintiffs offer no written objection to the Magistrate Judge's conclusion that they failed to exhaust their administrative remedies under Title VII, the affidavit of Carlos Segura does state: "[a]ttached hereto is the letter from the EEOC which the Magistrate demands..."). (Affidavit attached to objections, p. 11). However, there is no attached letter from the EEOC. Because there is no new evidence which may be considered by the Court, it must agree with the Magistrate Judge's conclusion that Plaintiffs failed to exhaust their administrative remedies.

B. Member of a protected group:

In her memorandum, the Magistrate Judge concluded that Plaintiffs could not establish a prima facie case of disparate treatment because they were not members of a protected group. (Recommendation, pp. 32-34). Prior to the Magistrate Judge issuing her memorandum, Plaintiffs simply referred to themselves as "Raza," which is a cultural/political term, rather than a term which accurately describes race or national origin. For the first time, Carlos Segura now contends that he "identifies himself as Indian." (Affidavit

attached to objections, p. 2). Assuming Mr. Segura is Indian, he is part of an ethnic group that qualifies for protection. *St. Francis College v. Majid Ghaidan Al-Khazraji*, 481 U.S. 604, 613, 107 S.Ct. 2022, 2028 (1987).

C. Prima facie case of discrimination:

Even if Mr. Segura is part of a protected group, he must still show that other similarly-situated employees, not in plaintiffs' protected group, were treated differently for the *same or similar* work rule infractions. *See Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1091 (5th Cir. 1995). In Mr. Segura's affidavit, which is attached to Plaintiffs' objections, he makes several conclusory remarks about "White employees" being treated differently, but he provides no facts to support such conclusions. For example, he states that "[t]here are just lots of examples of White Employees using worse language and using the TDHS computers for non-TDHS purposes which have gone completely ignored almost daily at the TDHS workplace in South Texas." (Affidavit attached to objections, p. 4). Yet he provides no facts. Mr. Segura does make reference to a printed e-mail message, which he claims "was written on TDHS Computers (obviously) by Cynthia Kruse (a White Female Supervisor in the same program who, after my complaint here has not even been investigated." (Affidavit attached to objections, pp. 4-5). However, the printed e-mall message (attached to the affidavit) purports to be *to* Cynthia Kruse, rather *than from* Cynthia Kruse and the author or person who forwarded the e-mail message has not been identified as a TDHS employee.[2]

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[2] Even if Plaintiff could identify such person as a TDHS employee, the Court docs not have enough evidence regarding the

These type of vague allegations are not sufficient to show a prima facie case of discrimination.

For these reasons, Plaintiffs' objections should be overruled. The Court has reviewed the remaining portions of the Memorandum and Recommendation of the United States Magistrate, and does not find that it is either clearly erroneous or contrary to law.

It is therefore ORDERED that the Memorandum and Recommendation of United States Magistrate Judge (Dkt. # 105) is ACCEPTED in its entirety. It is further ORDERED that Defendants' Partial Motion to Dismiss Claims brought pursuant to 42 U.S.C. § 1983 (Dkt. # 44); Defendant's Partial Motion to Dismiss Claim brought pursuant to 42 U.S.C. § 1982 (Dkt. # 43); Motion to Dismiss or for Judgment on the Pleadings of Defendant J.M. and Karen Lindsey with respect to claim brought pursuant to 42 U.S.C. § 1982 (Dkt. # 88); Motion to Dismiss or for Judgment on the Pleadings of Defendants J.M. and Karen Lindsey with respect to claims brought pursuant to 42 U.S.C. § 1985(2) (Dkt. # 89); Defendants' Motion to Dismiss Claims brought pursuant to 42 U.S.C. § 1985(2) (Dkt. # 56); Defendants' Motion for Judgment on the Pleadings, and for Summary Judgment based on Qualified Immunity (Dkt. # 92); and, Defendants' Motion for Judgment on the Pleadings, or in the Alternative, for Summary Judgment, with respect to Title VII allegations (Dkt. # 95) are GRANTED. All other pending motions are DENIED as MOOT.

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incident to conclude that Plaintiff was treated differently for a"nearly identical" work infraction.

SIGNED and ENTERED on the 17 day of March, 2001.

/s/ _____
ORLANDO L. GARCIA
UNITED-STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

Civil No. SA-00-CA-229-OG

[Filed February 14, 2001]

Carlos Segura, and Juan A Garcia, Plaintiffs, v. The Texas Department of Human Services; Michael Mason; Debora A. Billa; Genevieve Manley; Cynthia J Hahn; Timothy Reznicek; Philip V. Jones; Delores Torres; J. M. Lindsey, Karen B. Lindsey, and Unknown Defendant, James Doe, Defendants.	)

MEMORANDUM AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

TO: Honorable Orlando L. Garcia
United States District Judge

Memorandum and Recommendation
of United States Magistrate Judge - 2/14/01

I. Introduction

Numerous motions have been filed in this case. This Memorandum and Recommendation addresses the pending dispositive motions filed to date:[1] (a) defendants' partial motion to dismiss claims brought pursuant to 42 U.S.C. 8 1983 (docket entry 44); Co) defendants' partial motion to dismiss claims brought pursuant to 42 U.S.C. 8 1982 (docket entry 43) and the motion to dismiss said claims filed by the defendants identified in plaintiffs' amended complaint, J.M. & Karen Lindsey (docket entry 88); (c) defendants' motion to dismiss claims brought pursuant to 42 U.S.C. 8 1985(2) (docket entry 56), as well as the Lindseys' motion to dismiss or for judgment on the pleadings on said claims (docket entry 89); (d) defendants' motion for judgment on the pleadings and/or for summary judgment on plaintiffs' claims under 42 U.S.C. 88 1983 & 1981 on the basis of qualified immunity (docket entry 92); and (e) defendants' motion for judgment on the pleadings and/or for summary judgment with respect to plaintiffs' Title VII claims (docket entry 95). These motions,

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[1] Originally, defendants filed one pleading (docket entry 26) containing multiple motions. By Order entered June 19, 2000 (docket entry 40), I struck said pleading and advised defendants that they may refile their motions presented in docket entry 26 in separate motions. Docket entry 40, at 8. Defendants have done so and some of the motions originally submitted in docket entry 26 have been refiled separately and are the subject of this Memorandum and Recommendation. Before my Order was entered, however, defendants filed a motion for leave to file amended versions of the motions contained in docket miry. 26. Because docket entry 26 was struck from the record on June 19, 2000, defendants' motion for leave to file (docket entry 27) is **DENIED AS MOOT.**

if granted, would dispose of plaintiffs' case in its entirety. To date, plaintiffs have only responded to defendants' motion for judgment on the pleadings and/or for summary judgment based on qualified immunity (docket entry 93).[2] No response has been filed with respect to defendants' other six dispositive motions.

It is important to note that this Memorandum and Recommendation will solely address the matter in controversy arising from the relevant factual allegations beginning on February 8, 1999 to the filing of this suit. Plaintiffs have dedicated an extensive amount of prose in their 96-page first amended complaint, to their historical notions of what they perceived as oppression, racism, and even genocide, against members affiliated with the "Raza" political movement (or "Autochthonous People" as plaintiffs also identified themselves) by the "White Establishment."[3] In that regard, they state that this case presents an "issue of first impression" and further seek redress for over five hundred years of oppression.[4] This court, however, is not the proper forum to

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[2] The court notes that plaintiffs filed a request for an enlargement of time to file their response to defendants' motion by December 4, 2000. Because plaintiffs's response, filed December 4, 2000, was timely, there was no need to file a motion seeking an extension of time. Accordingly, plaintiffs' motion (docket entry 86) is **DENIED AS MOOT**.

[3] Docket entry 52. According to plaintiffs, the "White Establishment" not only includes defendants, but also this federal district court. *See also* docket entry 93.

[4] Docket entry 52, at 26 & 49.

address plaintiffs' historical claims of racism and oppression.[5] That said, I will proceed to analyze the viability of plaintiffs' causes of action under the applicable legal standards.

I have jurisdiction to enter this Memorandum and Recommendation under 28 U.S.C. § 636(b) and the District Court's Order referring all pretrial matters in this proceeding to me for disposition by order, or to aid in their disposition by recommendation where my authority as a Magistrate Judge is statutorily constrained.[6]

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[5] Consequently, the court refuses to take judicial notice, as requested by plaintiffs, of pleaded allegations, which in essence, constitute plaintiffs' one-sided views and personal opinions of historical events. For example, plaintiffs request judicial notice of statements such as: "Although individual Indians who adopted White Ways have always been permitted to come into the White Forts or Towns, the Indian Tribes and/or Nations have never been incorporated fully and completely into the White Society as equals of Whites;" "Wars, such as the 'French and Indian Wars,' involving 'Indian' people on their land, as fought in the New World at the end of the 17%century and early 18th century, were fought by such as the European nations of France and Britain motivated at least partly by their respective interest in establishing hegemony over portions of what was later to become the United States." Docket entry 53, at 10-13, ¶¶ 17 & 30. Statements such as these are not only relevant to the case at hand, but they also fail to meet the evidentiary requirements for the taking of judicial notice. *See* FED.R. EVID. 201 and FEB. R. CIV. P. 44. For these reasons, plaintiffs' motion for the taking of judicial notice (docket entry 53) is **Denied**.

[6] Docket entry 10.

II. Jurisdiction

Plaintiffs predicate jurisdiction of this court on 28 U.S.C. §§ 1331 & 1343, with respect to their causes of action pleaded under 42 U.S.C. §§ 1981, 1982, 1983, 1985(2) & 2000e (docket entry 52, at 5, and 90-94). Plaintiffs have failed to cite any statutory authority (nor have I found any) for their position that this court has jurisdiction of their pleaded first cause of action asserting an International Law violation (docket entry 52, at 5, and 88-90).

III. Factual Background

The relevant facts of this employment dispute brought against defendant, the Texas Department of Human Services ("TDHS"), and the individually named defendants, are straight forward, and for the most part, undisputed.

This lawsuit stems from the placement, and later unauthorized removal, of nineteen icons on a workplace computer at one of TDHS' offices, in Pearsall Texas.[7] Based on the titles given to the icons, TDHS determined that they were inappropriate, sexual in nature, non-work related, and in violation of various agency rules and policies. The icon titles at issue were: "Rudy's Naughty Box," "The XXX Files," "Old Girlfriend's Phone #,' "Desired Girlfriend's Phone," "El Mero Mero 6.0," "Rudy's Personal Love Fantasy," "Tips on How to Pick-up Girls," "John Holmes' Phone #," "Playmate of the Year," "Favorite 900 Phone #'S," "Coming Out of the Closet," "Super Bowl Pot," "Personal Psychologist Tele #," "101 Sex Questions," "Soap

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[7] Docket entry 52, at 16-19.

Opera Schedule," "Bank Note Due Dates, My Gay Life, AIDS Support Group," and "Boyfriend Telephone #." [8]

Shortly after the icons were discovered, TDHS had enough information to begin an internal investigation into plaintiffs' involvement in the incident.[9] At the time the incident occurred, on February 8-9, 1999, plaintiff, Carlos Segura, was a Supervisor for the Community Care-Aged and Disabled Program (CCAD), at the TDHS Pearsall office.[10] Plaintiff, Juan Gareia, was a CCAD Worker III, who officed, in Cotulla, Texas, but who on the date in question was performing diagnostic computer tests at the Pearsall office.[11] According to the information obtained during the internal investigation, including statements made by Garcia and Segura, Genevieve Manley, the CCAD Program Manager, recommended that Segura be demoted into the non-supervisory position of Worker III in the Community-Based Alternatives Program CCBA"), and that Garcia be suspended, without pay, for three days.[12] Manley's recommendation to demote Segura was in substantial part due to Garcia's statement to the investigator directly implicating Segura in the

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[8] Docket entry 92, Affidavits of Dolores Torres (Tab. 2); Cynthia Hahn (Tab. 3); and Philip V. Jones (Tab. 5).

[9] Docket entry 92, Affidavit of Genevieve Manley (Tab. 1).

[10] Docket entry 93, Segura's Affidavit, at 1.

[11] Docket entry 92, Affidavit of Genevieve Manley (Tab. 1); and docket entry 52, at 72.

[12] *Id.*

installation of the icons. Also, in making her recommendation, Manley considered Segura's own statements to the investigator concerning his actions in removing the icons after knowing they had been discovered and would, in all likelihood, be the subject of an official internal investigation.[13]

Objecting to Manley's recommendation to demote him, Segura invoked the agency's administrative grievance procedures and challenged the recommendation, through the assistance of counsel, at a management conference.[14] After TDHS affirmed the recommendation to demote Segura, he proceeded to the next step of the administrative grievance procedure by appealing TDHS' decision at a hearing before an administrative law judge ("ALJ").[15] At the hearing, Garcia, after being placed under oath, recanted his earlier statement made part of TDHS' internal investigation, by absolving Segura from any involvement in the placement of the icons.[16] Significantly, Garcia also testified at the hearing that he had not been coerced by TDHS in making his earlier statement implicating Segura in the incident, and Ghat he had taken no steps to correct his written statement prior to the

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[13] *Id.*

[14] Docket entry 92, at 8 & Affidavit of Deborah Billa (Tab. 4), Attachment A; and docket entry 93, Segura's Affidavit.

[15] *Id.*

[16] Docket entry 92, at 8 & Affidavits of Billa Tab. 4), Manley Tab. 1), & Jones (Tab. 5).

hearing.[17] Based on Garcia's hearing testimony, the ALJ found that TDHS' decision to demote Segura was erroneous and should be reversed.[18] Shortly after the hearing, TDHS reinstated Segura to the same pay he earned as a supervisor prior to his demotion.[19]

According to the summary judgment evidenc~ submitted by defendants, it appears that TDHS has attempted, on at least two occasions, to enter into settlement agreements with Segura. These settlement agreements would have provided Segura with back pay as compensation for the higher income he would have earned as a supervisor as compared to the salary he earned for six months in the lower non-supervisory position.[20] Also, according to defendants, the settlement offers would have restored Segura to a supervisory position.[21] Segura has, nonetheless, rejected both settlement offers and is currently employed by TDHS as a CBA Worker IV, although he is paid at the same supervisory level he held prior to his demotion.[22]

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[17] ***Id.***

[18] Docket entry 92, at 9; and docket entry 93, Segura's Affidavit.

[19] Docket entry 92, at 9.

[20] ***Id.*** & Affidavits of Billa (Tab. 4) & Manley (Tab. 1).

[21] ***Id.***

[22] ***Id.***

With respect to Garcia, TDHS first suspended him for three days without pay for his involvement in the placement of the icons. TDHS subsequently terminated his employment after Garcia testified under oath at Segura's administrative hearing that he had provided a false written statement to the agency investigator, which directly implicated Segura in the incident causing his demotion.[23] There is no evidence nor pleaded factual assertions that Garcia invoked TDHS' administrative grievance procedures to challenge his termination from employment.[24] Within two weeks of Garcia's effective date of termination from employment, plaintiffs filed the instant lawsuit.[25] The Attorney General of Texas answered the civil complaint on behalf of all named defendants.[26] Significantly, with respect to plaintiffs' Title VII claims, there is no evidence that plaintiffs exhausted their administrative remedies by filing a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") or that they received their fight to sue letter from the EEOC prior to filing this lawsuit.

At the very early stages of the lawsuit, defendants asserted the defense of qualified immunity. As a result, I

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[23] *Id.* at 9-I 0 & Affidavits of Manley (Tab. 1), Billa (Tab. 4), and Michael Mason (Tab. 7).

[24] To the extent that Garcia has filed a motion (docket entry 53) requesting that he be deemed as having exhausted the administrative remedies available to him prior to the filing of this suit, that request is hereby **DENIED**.

[25] Docket entry 1.

[26] Docket entry 6.

granted defendants' motion to stay discovery pending resolution of the issue.[27] Simultaneous to the stay of discovery, and due to plaintiffs' rambling and conclusory legal and factual allegations contained in his original complaint, I allowed plaintiffs to file an amended complaint with the factual detail required to overcome defendants' qualified immunity defense.[28] As discussed more fully below, their amended complaint, even though longer in length than the original version, docs not provide the factual specificity required to support their causes of action. After plaintiffs filed their amended complaint, defendants filed the dispositive motions which are the subject of this Memorandum and Recommendation.

IV. Issues Presented

(1) Whether TDHS and the individually named defendants, sued in their official capacities, are entitled to Eleventh Amendment immunity with respect to plaintiffs' claims pursuant to 42 U.S.C. §§ 1981 & 1983?

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[27] Docket entry 40.

[28] *See Elliott v. Perez,* 751 F.2d 1472, 1473 (5th Cir. 1985) ("To survive a motion for summary judgment against a likely defense of qualified immunity, the plaintiff's complaint [must] state with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense qualified immunity."). Also, *see* case authority cited in docket entry 40.

(2) Whether plaintiffs' claim pursuant to 42 U.S.C. § 1982 should be dismissed for failure to state a claim upon which relief may be granted?

(3) Whether plaintiffs' claim pursuant to 42 U.S.C. § 1985(2) should be dismissed for failure to state a claim upon which relief may be granted?

(4) Whether plaintiffs have established a prima facie of intentional discrimination under Title VII and 42 U.S.C. § 1981?

(5) Whether plaintiffs have established a viable cause of action under 42 U.S.C. § 1983 against the named defendants, sued in their individual capacities?

V. Applicable Standards

A. Dismissal Standard

Defendants have filed motions to dismiss under FED.R. CIV. P. 12(b)(1), 12(b)(6) & 12(c).[29] Rule 12(b)(1) authorizes the dismissal of a ease for lack of subject-matter jurisdiction when the district court lacks the statutory and constitutional power to adjudicate the case.[30] A district court

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[29] Docket entries 43-44, 56, 88-89 & 92 (in part).

[30] *See Home Builders Association of Mississippi, Inc., v. City of Madison,* 143 F.3d 1006, 1010 (5th Cir. 1998).

may dismiss a case for lack of subject-matter jurisdiction on any one of three different bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts in the record; or (3) the complaint supplement by undisputed facts plus the court's resolution of disputed facts.[31]

Rule 12(c), in turn, enables a party to move for judgment on the pleadings "after the pleadings are closed but within such time as not to delay the trial."[32] The movant, must establish, that on the basis of the pleadings, there is no issue of material fact to be resolved and that the movant is entitled to judgment as a matter of law.[33] Motions brought under Rule 12(c) should be read in conjunction with the standards outlined for motions brought under Rule 12(b), such as 12b)(1) & 12(b)(6).

Pursuant to Rule 12b)(6), a plaintiff's claim should be dismissed for failure to state a claim upon which relief may be granted when, viewing the allegations in the plaintiff's

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[31] *See Clark v. Tarrant County*, 798 F.2d 736, 741 (5th Cir. 1986) (citing *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir.), cert. denied, 454 U.S. 897 (1981)).

[32] FED. R. Civ. P. 12(c).

[33] *Id. See also* 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE §1369, 2d ed. 1987); and Frev v. Bank One. 91 F3d 45, 46 (7th Cir. 1996) ("We review a motion pursuant to [Rule] 12(e) under the same standard as a motion to dismiss under [Rule] 12Co). [T]he motion should not be granted unless it appears beyond doubt that the plaintiff cannot prove any facts that would support his claim for relief").

complaint in the light most favorable to him and drawing all reasonable inferences in his favor, it appears certain that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.[34] Rule 12Co)(6) allows a court to eliminate actions that are fatally flawed in their legal premises and destined to fail, thus sparing the litigants the burdens of unnecessary pretrial and trial activity.[35] Conclusory allegations or legal conclusions masquerading as factual allegations will not suffice to prevent a motion to dismiss pursuant to Rule 12(b)(6).[36] In ruling on a motion to dismiss, a court should consider only those facts stated on the face of the complaint or incorporated into the complaint by reference, and matters of which judicial notice may be taken.[37] If a complaint omits facts concerning pivotal elements ora plaintiff's claim, a court is justified in assuming the non-existence of those facts.[38]

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[34] *See Kaiser v. Aluminum &. Chem Sales Inc. v. Avondale Shipyard, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983); and *Adolph v. Federal Emergency Management Agency*, 854 F.2d 732, 735 (5th Cir. 1988).

[35] *See Spivey, Jr., v. Robertson*. 197 F.3d 772, 774 (5th Cir. 1999).

[36] *See Fernandez-Montes v. Allied Pilots Assoc.*, 987 F.2d 278 (5th Cir. 1993).

[37] *See Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1017 (5th Cir. 1996) and *McNamara v. Bre-X Minerals Ltd.*, 57 F. Supp.2d 396, 417 n.12 (E.D. Tex. 1999).

[38] *See Ledesma v. Dillard. Dept. Stores, Inc.*, 818 F. Supp. 983 (N.D. Tex. 1993).

B. Summary Judgment Standard

The named defendants have moved for summary judgment with respect to plaintiffs' causes of action under 42 U.S.C. § 1981 & 1983 brought against them in their individual capacities, as well as with respect to plaintiffs' Title VII claims.[39] The applicable standard in deciding a motion for summary judgment is set forth in FED. R. CIV. P. 56, which provides in pertinent part as follows:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.[40]

Mere allegations of a factual dispute between the parties will not defeat an otherwise proper motion for smnmary judgment. Rule 56 requires that there be no genuine issue of material fact.[41] In an employment discrimination case such as this one, the court focuses on whether a genuine issue of material fact exists as to whether the defendant

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[39] Docket entries 92 (in part) & 95.

[40] FED. R. CIV. 56(C); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

[41] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

intentionally discriminated against the plaintiff.[42] A fact is material if it might affect the outcome of the lawsuit under the governing law.[43] A dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.[44] Therefore, summary judgment is proper if, under governing laws, there is only one reasonable conclusion as to the verdict; if reasonable finders of fact could resolve a factual issue in favor of either party, summary judgment should not be granted.[45]

The movant on a summary judgment motion bears the initial burden of informing the court of the basis for its motion and identifying those portions of the record which it alleges demonstrate the absence ora genuine issue of material fact.[46] To satisfy this burden, the movant must either submit evidentiary documents that negate the existence of some material element of the nonmoving party's claim or defense, or if the crucial issue is one for which the nonmoving party will bear the burden of proof at trial, merely point out that the evidentiary documents in the record contain insufficient proof

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[42] *See La Pierre v. Benson Nissan, Inc.*, 86 F.3d 444, 447 (5th Cir. 1996) (citing *Armstrong v. City of Dallas*, 997 F.2d 62, 65-66 (5th Cir. 1993)).

[43] *Anderson*, 477 U.S. at 248; *Thomas v. LTV Corp.*, 39 F.3d 611,616 (5th Cir. 1994).

[44] *M. Wise v. E.I. DuPont De Nemours & Co.*, 58 F.3d 193, 195 (5th Cir. 1995).

[45] *Anderson*, 477 U.S. at 249.

[46] *Celotex Corp.*, 477 U.S. at 323.

concerning an essential element of the nonmoving party's claim or defense.[47] Regardless of whether the movant accompanies its summary judgment motion with affidavits or other evidentiary materials, the motion must be granted if the evidence before the court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied.[48] Once the movant has carded that burden, the burden then shifts to the party opposing the motion to present affirmative evidence in order to defeat a properly supported motion for summary judgment.[49]

The nonmoving party cannot discharge this burden by referring to the mere allegations or denials of the nonmoving party's pleadings.[50] Rather, the nonmovant must, either by submitting opposing evidentiary documents or by referring to evidentiary documents already in the record, set out specific facts showing the existence of a genuine issue for trial.[51] The court will look at the record in the light most favorable to the nonmovant drawing all inferences most favorable to that

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[47] *Edwards v. Aguillard*, 482 U.S. 578, 595 n. 16 (1987); and *Celotex Corp.*, 477 U.S. at 325.

[48] *Id.*

[49] *Anderson*, 477 U.S. at 257.

[50] FED. R. CIV. P. 56(e); *Anderson*, 477 U.S. at 250; *State of Texas v. Thompson*, 70 F.3d 390, 393 (5th Cir. 1995).

[51] *Celotex Corp*, 477 U.S. at 324; *Fields v. City of South Houston, Texas*, 922 F.2d 1183, 1187 (5th Cir. 1991); *Neff v. American Dairy Queen Corp*, 58 F.3d 1063, 1065 (5th Cir. 1995), *cert. denied*, 516 U.S. 1045 (1996).

party. [52] Nevertheless, "conclusory allegations, speculation, and unsubstantiated assertions are inadequate to satisfy the nonmovant's burden.[53] Summary judgment is mandated if the nonmovant fails to make a showing sufficient to establish the existence of an element essential to her ease on which she bears the burden of proof at trial.[54] Accordingly, summary judgment motions permit the court to resolve lawsuits without the necessity of trials if there is no genuine dispute as to any material facts and the moving party is entitled to judgment as a matter of law.[55]

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[52] *Hibernia Nat'l Bank v. Carner*, 997 F.2d 94, 97 (5th Cir. 1993). *See also Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (holding that a nonmovant cannot discharge her burden with doubt as to the material facts, by conclusory allegations, unsubstantiated assertions, or by only a scintilla of evidence).

[53] *See Douglass v. United Services Auto. Ass'n*; 79 F.3d 1415, 1429 (5th Cir. 1996) (citing *Forsyth v. Burr*, 19 F.3d 1527, 1533 (5th Cir.), *cert. denied*, 513 U.S. 871 (1994)).

[54] *Celotex Corp.*, 477 U.S. at 322 ("In such situation, there can be 'no genuine issue as to any material fact,' since a complete failure of the proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial"). *Id.* at 323.

[55] *See Fields*, 922 F.2d at 1187.

VI. Analysis

A. Plaintiffs' claims under 42 U.S.C. § 1981 & 1983 against TDHS and the individually named defendants, sued in their official capacities, fail as a matter of law.

According to their second and fourth causes of action as pleaded in the amended complaint, plaintiffs purportedly bring claims under 42 U.S.C. § 1981 & 1983,[56] against TDHS and the individually named defendants, sued in their official capacities. Plaintiffs make various conclusory allegations to the effect that they were deprived of due process of law, equal protection under the law, the rights secured by the privileges and immunities clause of the Fourteenth Amendment, and, curiously, "for the security of persons and property as is enjoyed by white citizens," and "for the tortuous interference with fundamental rights and privileges so as to deny self-determination and normal human development."[57] Plaintiffs seek damages and injunctive relief,[58] Although the first amended complaint does not state if plaintiffs are bringing

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[56] Section 1981 of the Civil Rights Act prohibits discrimination on the basis of citizenship in the making of contracts. Section 1983, in turn, does not in itself provide a source of substantive rights, but merely provides a method for vindicating federal rights conferred elsewhere. To recover under § 1983, a plaintiff must prove that the alleged constitutional or statutory deprivation was intentional or due to deliberate indifference, not a result of mere negligence. 42 U.S.C. § 1983.

[57] Docket entry 52, at 90-93.

[58] *Id.*

their § 1981 & 1953 claims against some or all of the named defendants, all defendants have nonetheless moved for a 12(b)(1) or 12(bX6) dismissal on the basis of Eleventh Amendment immunity.[59] As discussed more fully below, defendants' motions to dismiss plaintiffs' claims on the basis of Eleventh Amendment (or sovereign) immunity am meritorious and should be granted.

The Eleventh Amendment[60] generally divests federal courts of jurisdiction to entertain citizen suits directed against states.[61] "This jurisdictional bar applies regardless of the nature of the relief sought.[62] The Amendment "is not evaded

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[59] Docket entries 92 & 44. As the individual defendants have pleaded and filed motions on the basis of immunity, J.M & Karen Lindsey, the recently added defendants, have also pleaded immunity from suit in their official capacities. Docket entry 76.

[60] The Eleventh Amendment of the United States Constitution specifically provides:

> The Judicial power of the United States shall not be construed to extend to any suit in !aw or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

[61] *See Stem v. Abearn,* 908 F.2d 1, 2 (5th Cir. 1990) (citations omitted) (where court, in reversing partial summary judgment in favor of agency and county, held that TDHS employees were immune from liability in their official and personal capacities), *cert. denied,* 498 U.S. 1069 (1991).

[62] *Pennhurst State School & Hosp., v. Halderman,* 465 U.S. 89, 100 (1984).

by suing state employees in their official capacity, since such an indirect pleading device remains in essence a claim upon the state treasury.[63] The state, may voluntarily waive Eleventh Amendment protection, if unequivocally expressed, or Congress may forcibly pierce state sovereign immunity to the extent allowed, for example, by Section 5 of the Fourteenth Amendment.[64] However, it remains a settled constitutional principle that the Eleventh Amendment divests the federal judiciary of jurisdiction to hear citizen suits designed, ultimately, to secure monetary recovery from nonconsenting states. It is irrelevant for purposes of Eleventh Amendment immunity that the action is framed against the state directly, or indirectly against subordinate agencies, or officeholders operating in their official capacities.

Significantly, with respect to plaintiffs' section 1981 & 1983 claims, it is apparent that Congress did not intend to abrogate a state's Eleventh Amendment immunity under these statutes. *See Will v. Michigan Dept. of State Police*, where the United States Supreme Court specifically held that states and state officials sued in their official capacities are not deemed "persons" subject to suit within the meaning of § 1983;[65] and *Chaeko v. Texas A&M University*,[66] where the district court held that the Eleventh Amendment barred plaintiff's § 1981 &

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[63] *Id.* at 3 (citing *Pennhurst*, 465 U.S. at 101-02).

[64] *See Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989).

[65] 491 U.S. at 68-70.

[66] 960 F. Supp. 1180, 1199 (.S.D. Tex. 1997), aff'd, 149 F.3d 1175 (1998).

1983 claims for monetary damages against the individual defendants in their official capacities.

In this ease, it is undisputed that at all relevant times, the individually named defendants, sued in their official capacities, were employees of defendant TDHS.[67] It is also undisputed that defendant TDHS is an organ of state government.[68] Consequently, plaintiffs' claims for damages and injunctive (including retrospective) relief under § 1981 & 1983 against TDHS and the individually named defendants, sued in their official capacities, are barred by the Eleventh Amendment, and as such, should be dismissed for lack of subject matter jurisdiction.[69]

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[67] Docket entry 52, at 7-9.

[68] *See* TEX. HUM. RES. CODE ANN. chs. 11 & 21 (Vernon 2001) (TDHS created by legislature).

[69] *See Cronen v. Tex. Dept. of Human Services*, 977 F.2d 934, 938 (5th Cir. 1992) (affirming Rule 12(b)(6) dismissal of plaintiff's claims against Texas and TDHS on the basis of Eleventh Amendment immunity and further holding that the source of damages (whether monetary or injunctive) is irrelevant for Eleventh Amendment purposes when the suit is against state itself or state agency); and *Sessions v. Rusk State Hospital,* 648 F.2d 1066, 1069 (5th Cir. 1981) (affirming judgment in favor of defendant, specifically Finding that an award by a federal court of retrospective relief, is prohibited by the Eleventh Amendment even though the suit names a state official as the defendant). *See also Edelman v. Jordan.* 415 U.S. 651 (1974).

B. Plaintiffs have failed to state a claim upon which relief may be granted under 42 U.S.C. § 1982

In support of their § 1982 claim, plaintiffs' amended complaint states the following:

> This cause of action is that provided for directly under the US Constitution and under such as the terms of 42 U.S.C. § 1982, as herein elsewhere set forth, because the Plaintiffs, and the Plaintiffs' Ancestors, have not had and do not have the same fight in the State of Texas, as is enjoyed by white citizens, thereof, to inherit, purchase, lease, sell, hold, and convey real and personal property.[70]

Although plaintiffs for the most part correctly paraphrase the language of § 1982, nowhere in their amended complaint does it specify what real and personal property they rely on in asserting a § 1982 violation. Despite plaintiffs' imistence that this case brings far more serious violations against the Autoehthonous People by the "White Hegemony" from the time the Republic of Texas was founded, their amended complaint can only be reasonably construed to allege no more than an employment discrimination suit. Defendants have sought dismissal of this claim arguing that § 1982 was enacted to: eliminate radal discrimination in the sale or lease of real property; grant access to recreational facilities irrespective of the individual's race; and to prohibit the

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[70] Docket entry 52, at 91-92.

destruction of real property because of racial hatred,[71] Specifically, ac. cording to defendants, § 1982 docs not apply to employment discrimination claims.[72] According to my reading of plaintiffs' amended complaint, my review of the applicable case authority and my analysis of § 1982, I agree with defendants' position.

To state a clam under § 1982, a party, must allege an impairment of the type of property interest protected by the statutory language.[73] Since § 1982 only protects real and personal property interests, numerous courts have held that § 1982 does not apply to employment discrimination claims.[74]

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[71] Docket entry 43, at 2-3; and docket entry 88, at 3.

[72] *Id.*

[73] *See City of Memphis v. Greene*, 451 U.S. 100, 123-24 (1981).

[74] *See Krieger v. Republic Van Lines of Southwest, Inc.*, 435 F. Supp. 335, 337 (S.D. Tex. 1977)("Section 1982 is limited on its face to discrimination with respect to property rights; and is therefore, not available to a plaintiff alleging sex discrimination."); *Schirmer v.Eastman Kodak Co* No. Civ. A. 86-3533, 1987 WI, 9280, *4 (E.D. Pa. Apr. 9, 1987} (dismissal of § 1982 claim, finding that eraployment fights are not "property" for purposes of the statute), afl'd, 869 F.2d 591 (3d Cir. 1989); *Rick Nolan's Auto Body Shop, Inc., v. Allstate Insurance Co.*, 711 F. Supp. 475, 476-77 (N.D. IlL 1989) (granting dismissal of § 1982 claim, timing that employment rights are not "property" within the meaning of statute); Jursdo v. Eleven-Fifty Corp., 630 F. Supp. 569, 572 (C.D. Cal. 1985) (same), aff'd, 813 F.2d 1406 (9th Cir. 1987); A. be! y. Bonfa..nti, 625 F. Supp. 263, 269 (S.D.N.Y. 1985)(same); *Evans v. Meadow Steel Products, Inc.*, 572 F. Supp. 250, 253

The basis for these holdings is that employment rights are not "property" within the meaning of § 1982. "Regardless of whether plaintiffhad a property right in his continued employment, that right is not the same as a real or personal property right within the meaning of§ 1982."[75] While employment discrimination claims are not expressly excluded from § 1982, the wording of that provision clearly limits its application to transactions in real and personal property, such as leasing, selling and conveying such property. Alleged discrimination in the employment relationship does not implicate any of the concerns of § 1982.[76] For these reasons, defendants' motions to dismiss plaintiffs' § 1982 claim (docket entries 43 & 88) should be granted as plaintiffs' first amended complaint has failed to state a viable claim for relief under that statute.

(N.D. Ga. 1983) (granting dismissal of plaintiff's § 1982 claim); *.Roman v. Ninttara Frontier Transit Metro System Inc., et al,* 30 Fair Empl. Prat. Cas. (BNA) 1345 (W.D.N.Y. 1983) (granting dismissal of § 1982 claim on the basis that employment discrimination is not witMn thc scope of statute); *Tate v. Hills-McCanna Co.*, 42 Fair. Empl. Prac. Cas. (BNA) 138 (N.D. Ill. 1982) (Rule 12(b)(6) dismissal granted, finding no "right to labor" under § 1982); and *Johnson v. Dural County Teachers Credit Union,* 507 F. Supp. 307, 310 (M.D. Fla. 1980) (granting dismissal of§ 1982 claim).

[75] *Tate*, 42 Fair Empl. Parc. Cas. {BNA) at 138.

[76] ***Id.***

C. Plaintiffs have failed to state a claim upon which relief may be granted under 42 U.S.C. § 1985(2)

Although, again, it is unclear whether plaintiffs are alleging a § 1985(2) conspiracy against some or all of the named defendants, all defendants have nevertheless moved for a Rule 12(b)(6) dismissal.[77] Defendants argue that plaintiffs' fifth cause of action under 42 U.S.C. § 1985(2) fails as a matter of law because plaintiffs, after having been given an opportunity to amend their complaint, have failed to plead sufficient (if any) factual allegations establishing either a nexus between the alleged conspiracy and a court proceeding (whether federal or state), or that a racial or class-based animosity against them motivated defendants' actions.[78]

According to paragraph 91 of the Amended Complaint, plaintiffs allege:

> This cause of action is that provided for directly under the U.S. Constitution and under such as the terms of 42 U.S.C. § 1985, (2) because the Defendants, *as herein elsewhere set forth, with others here named and yet others not here named,* have conspired to deter, by force, intimidation, or threat, the Plaintiffs *from testifying in this court of the United States from attending such court,* or from testifying to any matter here now pending, freely, fully, and truthfully, or to

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[77] Docket entries 56 & 89.

[78] Docket entries 56, at 2-12; and 89, at 3-13.

> injure such Plaintiffs in his [sic] person or property on account of Plaintiffs having attended or testified, or to influence the verdict, and for conspiring for the purpose of impeding, hindering, obstructing, or defeating in any manner, the due course of justice in the State of Texas, with intent to deny the Plaintiffs the equal protection of the laws, or to injure the Plaintiffs or their property for lawfully enforcing, or attempting to enforce, the right ora person, or class of persons, to the equal protection of the laws.[79]

The above quoted paragraph, although reciting some of the language of§ 1985(2), fails to specifically identify those defendants who purportedly conspired against plaintiffs; the nature of the conspiracy for which plaintiffs are complaining; how the alleged conspiracy interfered with plaintiffs' participation in a court (federal or state) proceeding; and/or how the alleged conspiracy established a racial or class-based animus against the plaintiffs.

A liberal reading of the amended complaint sheds some light, albeit a very dim one, as to what plaintiffs attempt to plead as a § 1985(2) violation.[80] For instance, plaintiffs purport to claim that they were "framed" by those defendants who were involved in the internal investigation of the placement, and later unauthorized removal, of the computer

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[79] Docket entry 52, at 93 (Emphasis added).

[80] Docket entry 52, at 54-87, and in particular ¶¶ 37-39, 59-85.

icons, as well as those defendants who participated in the administrative grievance proceedings concerning Segura's demotion. Plaintiffs maintain that defendants' actions in "framing" them caused Segura to bc unfairly demoted and Garcia to be eventually terminated from employment. Further, plaintiffs contend that defendants' actions were motivated by their discriminatory animus towards plaintiffs' active membership and (overt identification) with the Raza political movement and related cultural identity. Particularly, according to plaintiffs, defendants resented an individual in a supervisory position, such as Segura, who held such different views (at least with respect to the Raza movement and/or culture) as theirs. The defendants involved in the internal investigation and administrative grievance proceedings complained of by plaintiffs were: Genevieve Manley, Deborah Billa, Cynthia Hahn, Michael Mason, Timothy Reznicek, Investigator Jones and Dolores Torres.

Besides the TDHS' administrative grievance proceedings available to Segura to challenge his demotion, the only other formal proceeding referred to by plaintiffs in their amended complaint involves the instant lawsuit. In that regard, plaintiffs state:

> At the very time of preparation of these Pleadings, although much reason to complain about further invidious machinations of the evidence by Defendants is rumored to be taking place, the Defendants continue to clamp down on Plaintiffs' access to the evidence by ordering all TDHS Employees with knowledge of the facts to not disclose or discuss the matter with Plaintiffs and their undersigned

> counsel. This has grossly serious implication with the Courts must take into account in continuing to perpetuate the grossly unfair advantage to these wrongdoers handed to them here simply because they are White.[81]

Because plaintiffs have failed to state a claim under 42 U.S.C. § 1985(2), as discussed more fully below, defendants' motions to dismiss said claim should be *granted*.

42 U.S.C. § 1985 provides, generally, that:

> in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. *Id.*

Two broad categories of conspiracies are described in § 1985(2).[82] The first four clauses of § 1985(2) describe

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[81] Docket entry 52, at 76, ¶ 67.

[82] *See Brawer v. Horowitz*, 535 F.2d 830, 83940 (3d Cir. 1976) and *Bradt v. Smith*, 634 F.2d 796, 80001 (5th Cir.), *cert. denied*, 454 U.S. 830 (1981).

conspiracies that are designed to obstruct the course of justice in the federal judicial system.[8] The last two clauses of § 1985(2) guard against those obstructions of justice "in any State or Territory" which have as their objects the denial of the equal protection of the laws.[9]

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[8] § 1985(2) provides, in part:

> If two or more persons in any State or Territory conspire to deter by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror ...

42 U.S.C. § 1985(2) (West 1994 & Supp. 2000).

[9] Section 1985(2) continues:

> [O]r if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny any citizen equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws, ...

Because the first four clauses of § 1985(2) refer to conspiracies that are designed to obstruct the course of justice "in any court of the United States," plaintiffs seeking to recover under those clauses must show a nexus between the alleged conspiracy and a proceeding in federal court. Plaintiffs fail to do so in this case. With the exception of the instant lawsuit, there was no prior federal court proceeding in this case. Plaintiffs' amended complaint in fact does not make any allegations concerning the existence ora prior federal proceeding. The only prior proceeding in this case was TDHS' administrative grievance proceeding available to Segura to challenge his demotion, and in which Garcia participated as a witness. This proceeding, however, does not meet the federal court nexus requirement.

To the extent that plaintiffs attempt to plead a conspiracy to interfere with their participation in the instant case, this claim fails because it would have been impossible for the defendants to have conspired to interfere with plaintiffs' rights in this case prior to the filing of the complaint. Further, plaintiffs' disagreement with my ruling staying discovery pending the resolution of the qualified immunity defense asserted by the defendants cannot form the basis of a conspiracy under § 1985(2). Having given plaintiffs an opportunity to replead their complaint one time, I am convinced that granting leave to amend the complaint one more time (although not requested by plaintiffs) would be futile in curing the fatal pleading deficiencies outline above.

Plaintiffs have also failed to establish a conspiracy under the last two clauses of § 1985(2). These last two clauses are designed to address conspiracies to interfere with plaintiffs' participation in a state court proceeding in order to

deny them equal protection of the laws. Plaintiffs who seek to recover under these clauses must show a racial or class-based discriminatory animus against them.[85]

Plaintiffs fail to plead with specificity the alleged illegal acts that were committed by the individual defendants in this case, or how these individuals "impeded, hindered, obstructed, or defeated" plaintiffs from participating in a state court proceeding. To the contrary, plaintiffs described the individual defendants' actions as: reporting a violation of agency policy, investigating the incident involving the computer icons; making disciplinary decisions affecting TDHS' personnel, and participating in Segura's administrative grievance proceedings.[86]

Even assuming, *arguendo*, that a TDHS' administrative hearing could be construed as a state court proceeding pursuant to § 1985(2), plaintiffs have nevertheless failed to allege how they were hindered from participating in said proceeding. In fact, plaintiffs themselves have pleaded that Segura gave a statement to Investigator Jones which was made part of the Investigation Report.[87] After having been appraised of the TDHS' recommendation to demote him, Segura was given the opportunity to request a management conference to challenge it. Segura attended the same and was represented by counsel. Once TDHS affirmed its

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[85] *Id. See Brudt*, 634 F.2d at 801(citing *Slavin v. Curry*, 574 F.2d 1256, 1262 (5th Cir. 1978)); and *Brawer*, 535 F.2d at 840.

[86] Docket entry 52, at 72-87.

[87] *Id.*

recommendation to demote him, Segura requested, and was granted, an administrative heating before an ALI to appeal it. Further, Segura testified at the hearing and obtained a favorable ruling from the ALJ. The ALJ's ruling in Segura's favor was due to Garcia's testimony at the hearing in which he recanted his earlier version by denying any wrongdoing on the part of Segura in the placement of the computer icons,[88] Even after having obtained a favorable decision at the administrative hearing level, plaintiffs continue to allege that the entire proceeding was unfair, from its inception, for the simple reason that "white people" administered it.[89] This conclusory allegation cannot serve as the basis to state a viable § 1985(2) claim.

Likewise, plaintiffs have failed to allege a conspiracy based on a racial or class-based invidious discriminatory animus on the part of defendants to deny them equal protection of the laws. The mended complaint is devoid of any specific facts as to the identity of the individual defendants who purportedly discriminated against them, and/or the nature of the conspiracy complained of, and more importantly, how the alleged conspiracy between these defendants demonstrates a racial or class-based discriminatory animus against the plaintiffs. The only assertions made in the

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[88] *Id.* at 79-80, ¶¶ 72 & 73.

[89] The amended complaint is also replete with unfounded assertions that the federal court system, and particularly, the judiciary in this division, is in itself biased and discriminatory against Raza members because it is comprised of mostly "White Judges" or "Hispanic Judges" who have acquiesced to the "White Hegemony" in order to succeed. Docket entry 52, at 59, 71 & fn. 72, and 77-87.

complaint are those related to the plaintiffs' general perspectives on the plight of the RaTa members. Moreover, in taking plaintiffs' definition of the term "Raza" as stated in their complaint,[90] I fail to see how it establishes a racial group within the ambit ofthe equal protection clause. According to plaintiffs' conclusory allegations, the only conceivable explanation for defendants' disciplinary action had nothing to do with their involvement in the placement of inappropriate computer icons, but rather was motivated by their supposed discriminatory animus against them as Raza members. Plaintiffs have not pleaded how Mexican-American employees, or even Native-American employees, as a group, were conspired against at TDHS. For example, plaintiffs, as Raza, try to distinguish themselves from the so-called "Hispanic" employees (such as Dolores Torres) who have acquiesced to the ways of the "White Management" in order to advance their careers at the agency. This assertion, with no factual support, does not sufficiently suggest a racial or class-based invidiously discriminatory animus behind the actions complained of by plaintiffs.

Because it is my opinion that allowing plaintiffs to replead would be futile in curing the fatal deficiencies of their amended complaint, as discussed above, defendants' motion to dismiss plaintiffs' § 1985(2) came of action (docket entries 56 & 89) should be granted.[91]

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[90] Docket entry 52, at 6 & fn. 6.

[91] Plaintiffs were given until February 1, 2001 to respond to the Lindseys' motion to dismiss (docket entry 89). Plaintiffs have not filed their response as of the entry date of this Memorandum. A review of the record in this case indicates the lack of adherence by plaintiffs' counsel to the requirements of the Federal Rules of

D. Plaintiffs have failed to establish a *prima facie* case of intentional discrimination under Title VII and 42 U.S.C. § 1981

A reading of plaintiffs' amended complaint reveals their attempt to plead an employment discrimination suit against defendants stating that as Raza members they were disparately treated in their conditions of employment. Specifically, plaintiffs allege disparate treatment in TDHS' enforcement of its work rules and policies against them. Also, it appears Segura has attempted to plead a failure to promote claim. Defendants have moved for judgment on the pleadings, or in the alternative, for summary judgment on the following grounds: (1) there is no individual liability under Title VII as a matter of law, and as such, the individual defendants should be dismissed from the instant suit; (2) plaintiffs have failed to establish their *prima facie* case of intentional discrimination under Title VII namely that they belonged to a protected group and that other employees, non members of their protected group, were treated differently under "nearly identical circumstances;" (3) with respect to Segura's failure to promote claim, defendants argue that he has failed to establish that he was qualified for the position sought; and (4) even assuming, *arguendo*, that plaintiffs have met all elements of their prima facie case, TDHS has provided legitimate non-discriminatory reason for its actions regarding both plaintiffs.[92] Even though plaintiffs were given an extension to

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Civil Procedure and local Rules, as exhibited by his continuous failure to timely respond to defendants' dispositive motions and other pleadings in this case.

[92] Docket entry 95, at 15-26.

file their response to defendants' summary judgment motion, they have not done so as of this date. Because defendants rely on evidence outside the scope of the amended complaint and amended answers in seeking judgment on plaintiffs' substantive claims under Title VII, their motion will be analyzed under the summary judgment standard.

1. No Evidence That Plaintiffs Have Exhausted Their Administrative Remedies

As a preliminary matter, it should be noted that it appears that plaintiffs have failed to exhaust their statutory administrative remedies with respect to their Title VII claims because there is no mention in their complaint, or anywhere in the record, that they filed a charge of discrimination with the EEOC before commencing the instant lawsuit.[93] According to the record, Garcia's effective date of termination from employment was January 31, 2000.[94] The plaintiffs filed the instant lawsuit on February 17, 2000.[95] Even assuming that plaintiffs did file an EEOC charge, either jointly or separately, at least with respect to Garcia, it is highly unlikely

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[93] In Texas, to maintain a Title VII claim, a plaintiff must file a charge of discrimination with the EEOC and/or the Texas Commission of Human Rights within 300 days of the "alleged unlawful employment practice." *See* 42 U.S.C. § 2000e-5(e); *Dupont-Lauren v, Schneider (USA), Inc.*, 994 F. Supp. 802, 814 (S.D. Tex. 1998) (citing *Anson v. University of Texas Health Science Center at Houston*, 962 F.2d 539, 540 (5th Cir. 1992)).

[94] Docket entry 95, at 10; and docket entry 92, Affidavits of Manley (Tab. 1) and Billa (Tab. 4).

[95] Docket entry 1.

that the EEOC would have processed the charge, investigated it, entered a notice of dismissal and issued a right to sue letter, in a time period of less than three weeks.

According to the Fifth Circuit case of *Tolbert v. United States*.[96] there are two jurisdictional prerequisites a plaintiff must meet before filing a Title VII action in federal court: (1) the complaint must be filed within the time allotted by Title VII (90 days), and (2) *the complainant must first have exhausted her administrative remedies?*[97] "Failure to comply with either of those requirements wholly deprives the district court of jurisdiction over the case; it is well-settled law of this circuit that each requirement is a prerequisite to federal subject matter jurisdiction."[98] Plaintiffs have the burden of establishing that the jurisdictional prerequisites have been met prior to bringing an action in federal court, that is, that they have exhausted their administrative remedies. Further, plaintiffs bringing employment discrimination cases must state in their complaints that they have exhaused the administrative

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[96] 916 F.2d 245 (1990).

[97] *Id.* at 247 (emphasis supplied). *See also Barnes v. Levitt*, 118 F.3d 404, 408-09 (5th Cir. 1997) (district court lacked jurisdiction over employee's Title VII claims, given her failure to exhaust administrative remedies), *cert. denied*, 118 S.Ct. 1839 (1998); *Bickham v. Miller*, 584 F.2d 736, 737 (5th Cir. 1978) (employee's failure to submit an administrative complaint within 300 days of the promotion denial warranted dismissal of the suit for lack of jurisdiction). No such administrative exhaustion requirement exists for a claim brought under 42 U.S.C § 1981. *See Walker v. Thompson*, 214 F.3d 615, 624 (5th Cir. 2000).

[98] *Tolbert*, 916 F.2d at 247-48 (citations omitted).

remedies available to them as a condition precedent to filing suit in federal court.[99] In that regard, plaintiffs routinely attach a copy of their EEOC charge and right to sue letter (if applicable) to their complaints. Plaintiffs have failed to do so in this case. Not meeting the jurisdictional prerequisite of exhausting their administrative remedies can result in dismissal of the instant Title VII action. Curiously, defendants did not move for judgment on this issue. Even though plaintiffs have clearly not met the jurisdictional prerequisites for filing a Title VII action in federal court, I will nevertheless analyze the substantive merits of plaintiffs' allegations.

2. No Individual Liability Exists Under Title VII

Before discussing the analytical framework applicable to Title VII claims, I must consider defendants' motion for judgment on the pleadings on plaintiffs' Title VII claim against the individually named defendants, pursuant to FED. R. CIV. P. 12(e).

It is settled law that "individual defendants [such as employees, supervisors, or agents of the agency/corporate employer] cannot be held liable for damages under Title VII."[100] The court need not look beyond the pleadings to

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[99] 42 U.S.C. § 2000e-5(f)(3).

[100] *See Huckabay v. Moore*, 142 F.3d 233, 241 (5th Cir. 1998) (if named defendant acted only in his individual capacity, he did not act as an "employer" and would not be liable under Title VII); and *Grant v. Lone Star Co., B.L.*, 21 F.3d 649, 652-53 (5th Cir. (same), *cert. denied*, 513 U.S. 1015 (1994).

determine that as a matter of law plaintiffs cannot prevail against these defendants. In this ease, plaintiffs have named these individuals in their amended complaint and described them by their titles as employees of defendant TDHS.[101] Accordingly, defendants' Rule 12(c) motion for judgment on the pleadings (docket entry 95) on plaintiffs' Title VII claims against individual defendants Michael Mason, Deborah Bi!la, Genevieve Manley, Cynthia Hahn, Timothy Reznicek, Phillip Jones, Dolores Torres, J.M. Lindsey and Karen Lindsey, should be *granted.*[102]

3. Plaintiffs cannot...meet their prima facie c.ase of intentional discrimination

a. Analytical Framework

A plaintiff can prove a claim of intentional discrimination under Title VII by either direct or circumstantial evidence. Absent direct evidence of discriminatory intent, proof via circumstantial evidence is evaluated using the framework set forth in the seminal case of *McDonnell Douglas Corp. v. Green.*[103] "First, the

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[101] Docket entry 52, at 7-9.

[102] At least one district court has held that the Civil Rights Act of 1991 did not intend to include individual supervisory personnel within the meaning of "employer." *See Vodde v. Indiana Michigan Power Co.*, 852 F. Supp. 676, 680-81 (N.D. Ind. 1994); and 42 U.S.C. § 1981a.

[103] 411 U.S. 792 (1973).

plaintiffmust establish a prima facie case of discrimination.[104] Second, the employer must respond with a legitimate, nondiscriminatory reason for its decision.[105] The burden on the employer is only one of production, not persuasion, involving no credibility assessments.[106] Third, if the employer carries its burden, the "mandatory inference of discrimination" created by the plaintiff's prima facie case,[107] "drops out of the picture" and the fact finder must "decide the ultimate question: whether [the] plaintiff has proven [intentional discrimination]."[108]

In making this showing, the plaintiff can rely on evidence that the employer's reasons were a pretext for unlawful discrimination.[109] "[T]he trier of fact may still consider the evidence establishing the plaintiffs prima facie case 'and inferences properly drawn there from ... on the issue of whether the defendant's explanation is pretextual.'"[110]

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[104] *Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S.Ct. 2097, 2106 (2000).

[105] *See McDonnell Douglas*, 411 U.S. at 802.

[106] *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255-56 (1981).

[107] *Id.* at 256 & n. 10.

[108] *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 51-12 (1993).

[109] *See McDonnell Douglas*, 411 U.S. at 804.

[110] *Reeves*, 120 S. Ct. at 2106 (quoting *Burdine*, 450 U.S. at 255 & n. 10).

However, as the United States Supreme Court stated in *Hicks*, a showing of pretext does not automatically entitle an employee to a judgment as a matter of law.[111] It is "not enough ... to disbelieve the employer; the [fact finder] must *believe* the plaintiff's explanation of intentional discrimination."[112] This statement in *Hicks* apparently caused confusion as to whether intentional discrimination could be inferred from a showing of pretext.[113]

The United States Supreme Court recently resolved the circuit split in *Reeves* by rejecting the "pretext-plus" approach, thus overruling the Fifth Circuit's decision in that case.[114] A unanimous Court held that the Fifth Circuit had "misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence."[115] "Thus, a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."[116]

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[111] *Hicks*, 509 U.S. at 524.

[112] *Id.* at 519 (Emphasis in original).

[113] *Reeves*, 120 S. Ct. at 2104-05 (describing the circuit conflict resulting from the confusion).

[114] *Reeves v. Sanderson Plumbing Products, Inc.*, 197 F.3d 688 (5th Cir. 1999); and *Reeves*, 120 S.Ct. at 2108.

[115] *Reeves*, 120 S.CT. at 2108.

[116] *Id.* at 2109.

The Court in *Reeves* further stated that, more likely than not, a showing of pretext will lead to an inference of discrimination: "Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision."[117]

The *Reeves* Court also cautioned that there may be instances, although rare, where a showing of pretext would not be sufficient to infer discrimination. Such a situation would occur "if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiffcrcated only a weak issue of fact as to whether thc employer's reason was untrue and there was *abundant and uncontroverted independent evidence that no discrimination occurred.*"[118]

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[117] *Id.* at 2108-09.

[118] *Id.* at 2109 (emphasis added). The *Reeves* ruling rejected part of the Fifth Circuit's decision in *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (1996). In so doing, the Court noted that *Rhodes* stood for the proposition that the "plaintiff must introduce sufficient evidence for [the] jury to find both that [the] employer's reason was false and that [the] real reason was discrimination." *Reeves*, 120 S.Ct. at 2105 (emphasis added) (statement in parenthetical). This pretext-plus requirement is contrary to the *Reeves* Court's holding that the employer's prevarication may be sufficient in many cases to demonstrate discriminatory animus. *Id.* at 2108-09. While portions of the *Rhodes* decision do not appear to fully comport with *Reeves* the Fifth Circuit has already recognized central features of the *Rhodes* decision that survive *Reeves*. *See Vadie v. Miss. State Univ*, 218 F.3d 365, 373 n. 23 Cir. 2000)

With this framework in mind, I will proceed to analyze plaintiffs' evidence in support of their *prima facie* case of discrimination under Title VII.

b. Application of the Analytical Framework

Title VII provides that:

> [i]t shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's race, color, religion, sex, or national origin."[158]

Under the *McDonnell Douglas* circumstantial evidence framework, to establish a *prima facie* case of disparate treatment in the enforcement of TDHS' work rule violations, plaintiffs must prove three elements: (1) that they are members of a protected group; (2) they suffered an adverse employment action based on a work rule violation; and (3) either they did not violate the rule or that, even if they did, employees (not in their protected group), who engaged in

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("*Rhodes* is consistent with *Reeves* and continues to be the governing standard in this [Fifth] Circuit."). Nevertheless, in evaluating plaintiff's discrimination claim under the *McDonnell Douglas* framework, this court is cognizant that it must not unduly restrict a plaintiff's circumstantial case of discrimination.

[158] 42 U.S.C. § 2000e-2(a)(1).

similar acts were not punished similarly.[10] For Segura to establish his failure to promote claim, he must prove that: (1) he is a member of a protected group; (2) he applied for and was qualified for a job for which TDHS was seeking applicants; (3) despite his qualifications, he was rejected; and (4) after his rejection, the employer promoted another employee not in his protected group.[11]

c. Disparate treatment in the enforcement of TDHS' work rules.

To succeed in establishing their *prima facie* case of disparate treatment, Segura and Garcia must show that other similarly-situated employees, non-members of their protected class, were treated differently under circumstances "nearly identical to [theirs]."[12] Defendants contend that plaintiffs cannot meet two of their *prima facie* elements, that is, that they are members of a protected group, and that other similarly-situated employees, not in plaintiffs' protected group, were treated differently (i.e., more leniently than they were treated) for the same or similar work rule infractions.[13]

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[10] *See Vaughn v. Edel*, 918 F.2d 517, 521 (5th Cir. 1990).

[11] *See Dupont-Lauren v. Schneider (USA), Inc.*, 956 F. Supp. 810, 818 (S.D. Tex. 1998); and *Cochran v. Houston Light and Power Co.*, 956 F. Supp. 657, 662 (S.D. Tex. 1996).

[12] *See Blackburn v. Vaught Aircraft Co.*, 53 F.3d 1225, 1231 (5th Cir. 1995) (no disparate treatment found) (citations omitted).

[13] Docket entry 30, p. 22.

Regarding whether plaintiffs are members of a protected group, they assert they are "Raza." According to plaintiffs, thc term "Raza"-is not to be equated with thc terms "Hispanic" or "Latino." Plaintiffs argue that those individuals, even of Mexican-American descent such as Dolores Torres, who perceive themselves as "Hispanic" or "Latino" have in essence adopted non-indigenous "European" cultural practices and become "white" in order to succeed.[124] Throughout their amended complaint, plaintiffs alternatively use the term "Ram" to deseribe a racial or ethnic identity on the one hand, and a cultural identity/political affiliation on the other.[125]

Plaintiffs' self-identification as "Raza,' in and of itself, does not establish that they belong to the protected category of'Native Americans." In *Campos v. City of Baytown,* Texas,[126] a case brought under the Voting Rights Act, the Fifth Circuit relied on the legal usage given by the Bureau of the Census to the term "Native American" or"American Indian:"

> The category of American Indian includes persons who indicated their race as Indian (American) or who did not indicate a specific race category but reported the name of an Indian tribe. The population designated as

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[124] Docket entry 52, at ¶¶ 31-34.

[125] *Id.* at ¶¶ 36-39.

[126] 849 F.2d 943 (5th Cir. 1988), *cert. denied*, 492 U.S. 905 (1989).

> Alaskan Native includes persons residing in Alaska identified themselves as Aleut, Eskimo, or American Indian.[127]

Because not every American Indian or Nativo American is necessarily "Raza," as that term has been defined by the plaintiffs in this case, I fail to see how the term can be used to denote a race, an Indian tribe, or a national origin.

Moreover, plaintiffs' self-designation as "Raza" in the cultural/political sense- that they "refuse to become white to succeed," or that they are "not willing to forego all present commitment, affiliation or association with such [ ] organizations such as *La Raza Unida Party*..."- also fails to establish that they belong to a protected group as envisioned by Title VII.[128] In *Garcia v. Gloor*,[129] a case relied upon by TDHS, the Fifth Circuit considered a claim brought by a Mexican-American employee that his employer's "English only" rule violated the rights of Mexican-American employees on the basis of their national origin. In finding that the "English only" rule at issue did not violate Title VII, the *Garcia* court noted that Title VII is directed at impermissible bases of discrimination such as those based on immutable characteristics, i.e., race, color, religion, sex, or national origin:

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[127] ***Id.*** at 945 &fn. 1.

[128] Docket entry 52, at ¶ 31.

[129] 618 F.2d 264 (5thCir. 1980), *cert. denied*, 449 U.S. 1113.

> National origin must not be confimed with ethnic or sociocultural traits or an unrelated status, such as citizenship or alienage [...] or poverty [...], or with activities not connected with national origin, such as labor agitation, [...]. Save for religion the discriminations on which [Title VII] focuses its laser of prohibitions are those that are either beyond the victims' power to alter, [...] or that impase a burden on an employee on one of the prohibited bases. No one can change his place of birth (national origin), the place of birth of his forebears (national origin), his race or fundamental sexual characteristics.[130]

As in *Garcia*, plaintiffs in the present case base their Title VII claims of discrimination on mutable characteristics by arguing they have been discriminated against because of their cultural/political practices. For example, they contend their opportunities for career advancement at TDHS were thwarted because they refused to "think like white people" or "give in to the White Establishment," continuing instead to conduct themselves as "Raza." As discussed more fully below, besides making these conclusory allegations, there is no evidence on the record that TDFIS has denied Segura (who had been employed at TDHS since 1976) and/or Garcia conditions of employment due to their cultural and/or political affiliation. Even ifTDHS had in fact penalized plaintiffs (as they contend), for their cultural practices, such practices are not immutable characteristics as described above; and thus, not protected by Title VII.

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[130] ***Id.*** at 269 (Emphasis added).

Based on their Spanish surnames, the only protected national origin group that can be inferred from plaintiffs' complaint is that of "Hispanic" or "Latino.' Plaintiffs have nevertheless strongly objected to belonging to that group.[131] Accordingly, because plaintiffs have failed to establish their first *prima facie* element that they belonged to a protected group, TDHS' motion for summary judgment should be granted on that basis. I will nevertheless proceed to discuss whether plaintiffs have met their third *prima facie* element of disparate treatment.

Besides disagreeing with TDFIS' characterization of the computer icons as being "inappropriate," "sexual in nature" and "non-work related," plaintiffs do not dispute the actual titles of the icons. It is also undisputed that the discovery of such icons by a female co-worker prompted an internal investigation of plaintiffs' involvement in the incident. According to the results of the investigation with respect to plaintiffs' involvement, TDHS made the disciplinary decision to demote Segura into a non-supervisory position and give Garcia a three-day suspension without pay. When it was later discovered that Garcia had given a false statement to the investigator concerning Segura's involvement in the placement of the icons, TDHS made the decision to terminate his employment. The agency work rules or policies involved in the demotion of Segura were: (1) TDHS Agency Work Rule No. 4710 § B-4 (personal conduct expected of an employee to further the agency's goals and objectives) and § B-12 (prohibiting the unauthorized use of agency property for personal purposes); (2) TDHS Computer Security Agreement (prohibiting the personal use of the agency's automated

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[131] Docket entry 52, at 42, ¶ 19.

system for a non work related purpose or the unauthorized alteration of the system's database); and (3) TDHS Automation and Telecommunications Handbook, § 3510 (governing the proper use of the agency's automated system by employees in accordance with state law).[132] The work rule involved in Garcia's termination, TDHS Work Rule 4710 § B-10, specifically prohibited making false statements on any agency document or against any co-worker,[133] The essence of their federal complaint, however, is that other similarly-situated employees, not members of their protected group (assuming that plaintiffs have met this element), were treated differently for similar work-rule infractions. Both plaintiffs fail to meet this burden.

In Segura's case, the only two employees he has identified throughout his complaint for purposes of disparate treatment analysis are: Dolores Torres (Mexican-American) and Karen B. Lindscy (presumably Caucasian). Neither individual violated similar or "nearly identical" work rule infractions. For example, in the case of Dolores Torres, Segura alleges that he himself was investigating her for excessive personal use of thc telephone during business hours. Segura alleges that instead of disciplining her for her excessive phone use, TDHS decided instead to reward her (i.e., by transferring to another office location of her choice) for having discovered and reported the computer icons at issue in this case. Dolores Torres was a Medicaid Eligibility

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[132] Docket entry 95, at 23(a)(d); and docket entry 92, Manley's Affidavit (Tab. l), Attachments A-D.

[133] Docket entry 92, Manley's Affidavit (Tab. 1), Attachment B.

Worker with no supervisory duties.[134] Assuming that Segura's allegations are true, Torres' alleged excessive telephone use is in no way related or similar to the work rule infractions for which he was disciplined.

With respect to Karen Lindsey, who was Segura's secretary, TDHS discovered during the investigation of the computer icons that Segura had approved an arrangement whereby Lindsey would finish her work-related duties early to work for her husband's janitorial service during business hours. This arrangement was approved by Segura himself without following the agency's protocol concerning requests for dual employment. Once TDHS discovered the arrangement, it counseled Lindsey and instructed her to discontinue her dual employment activities. TDHS also advised Segura that as Lindsey's direct supervisor, he should not have approved the arrangement without following agency procedures.[135] To argue that Karen Lindsey's work role violation, which was in fact condoned by Segura as her supervisor, presented nearly identical circumstances as Segura's situation, is unfounded. Segura has simply failed to identify even one supervisory employee who was not demoted after having violated similar work rules and policies.[136] The

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[134] Docket entry 92, Affidavit of Dolores Torres (Tab. 2).

[135] Docket entry 92, at 25 & Manley's Second Affidavit (Tab. 8).

[136] *Mayberry*, 55 F.3d at 1092 (plaintiff did not offer evidence sufficient to support a finding that white employees in circumstances "nearly identical" to his have been treated differently); and *Little v. Republic Ref. Co.*, 924 F.2d 93, 96-97 (5th Cir. 1991) (rejecting rebuttal evidence of disparate treatment

fact that TDHS initially relied on Garcia's written statement directly implicating Segura in the incident, which was later proved to be false, is of no consequence. Where an employer incorrectly believes an employee has violated work policy and acts on that good faith belief, it does not constitute discrimination under Title VII.[137]

Garcia's disparate treatment claim is weaker than Segura's because he fails to identify even one similarly-situated employee, not in his protected group (assuming that he has met that element), who was not terminated under similar circumstances for having provided a false written statement about a co-worker. Because plaintiffs have failed to establish their prima facie cases of disparate treatment under Title VII, namely that they belong to a group protected under the statute, and that other similarly-situated employees, not in their protected group, were treated differently by TDHS for similar or nearly identical work rule infractions, I recommend that TDHS' summary judgment motion on that claim (docket no. 95) be *granted*.

d. Failure to Promote Claim

To the extent that Segura has pleaded a failure to promote claim, by asserting that he, and not Deborah Billa, should have been promoted for the position of Regional Director for the Long Term Care Services Program, that

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because circumstances were not "nearly identical.").

[137] *See Jefferies v. Harris County Community Action Association*, 615 F.2d 1025, 1036 (5th Cir. 1980) (citations omitted).

claim fails as well.[138] According to the uncontradicted summary judgment evidence submitted by defendants, that position was two management levels above a supervisory position such as the one held by Segura. Further, defendants have presented competent summary judgment evidence, not refuted by plaintiffs, that TDHS, in reviewing both candidates, determined that Billa's employment background was more suitable for the promotion. For example, Billa's background included having served as Program Manager (a position one management level above that of supervisor) at TDHS for a period often years and as Interim Regional Director.[139] Segura has provided no evidence, besides his speculations and beliefs, that would lead me to conclude that TDHS' decision to promote Billa and not him was motivated by unlawful discrimination. Accordingly, TDHS' motion for summary judgment (docket entry 95) should be granted on this claim.

e. Plaintiffs' Claim under § 1981

Section 1981, which originated in thc Civil Rights Act of 1866, assures "all persons" the same rights "enjoyed by white citizens" in making and enforcing contracts and in exercising other described fights. "Section 1981 is a parallel remedy against discrimination which may derive its legal principles from Title VII."[140] Because the employment

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[138] Docket entry 52, at 52.

[139] Docket entry 92, at 24.

[140] *See Garcia*, 618 F.2d at 271 (quoting *Blum v. Gulf Oil Corp*, 597 F.2d 936, 938 (5th Cir. 1979)).

discrimination claims brought by plaintiffs in this case under both § 1981 and Title VII are analyzed under the same evidentiary framework, plaintiffs' § 1981 claim fails for the same reasons discussed above.[141]

E. Plaintiffs have failed to establish a viable cause of action under 42 U.S.C. § 1983

Plaintiffs have purportedly asserted equal protection and due process claims under § 1983.[142] Defendants have moved for summary judgment on those claims arguing that plaintiffs have failed to establish a violation of a well-established constitutional right, and alternatively, that the named defendants, sued in their individual capacities, are entitled to qualified immunity.[143]

1. Equal Protection Claim.

In asserting a claim under the Equal Protection Clause of the Fourteenth Amendment, plaintiffs have simply restated their Title VII disparate treatment and failure to promote claims. Plaintiffs' claims of intentional racial and/or national origin discrimination may not also form the basis of a second, separate claim under § 1983, unless the facts relied upon also

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[141] *See Walker*, 214 F.3d at 625. Alternatively, for the reasons set forth in defendants' brief, plaintiffs' § 1981 claim against the named defendants, sued in their individual capacities, fails on the basis they are entitled to qualified immunity. *See* docket entry 92.

[142] Docket entry 52, at 92-93.

[143] Docket entry 92, at 15-41.

establish a violation of some federal right independent of Title VII. [144] Consistent with my recommendation that plaintiffs have failed to establish a *prima facie* case of intentional discrimination under Title VII, plaintiffs have also failed to establish a violation of a federal right independent of Title VII. Accordingly, the defendants' motion for summary judgment (docket entry 92) on plaintiffs' Equal Protection claim should be likewise *granted*.[145]

2. Due Process Claim

Regarding their due process claim, Segura and Garcia offer little guidance in their complaint for the factual underpinnings of this cause of action.[146] For instance, they appear to allege that: (l) TDHS did not follow its own policies because, according to their own interpretation, the installation of the "non-work related" computer icons, many of which had titles sexual in nature, could not have legitimately been found to be in violation of agency policy;[147] (2) TDHS' internal investigation was conducted unfairly in that they were never approached or given an opportunity to explain their side of the

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[144] *See Southard v. The Texas Board of Criminal Justice*, 114 F.3d 539, 548-49 (5th Cir. 1997).

[145] Alternatively, for the reasons set forth in defendants' brief, plaintiffs' equal protection claim against the named defendants, sued in their individual capacities, fails on the basis they are entitled to qualified immunity. Docket entry 92, at 24-41.

[146] Docket no. 52, at ¶ 92.

[147] *Id.* at ¶ 81 & fn. 81.

story;[148] (3) plaintiffs deny that Garcia intentionally made a false written statement to Investigator Jones implicating Segura in the placement of the computer icons;[149] and (4) plaintiffs allege that the administrative hearing process was tainted and biased from its inception, regardless of the favorable outcome for Segura. [150] Based on the summary judgment record before me, none of these allegations proves a violation of a well-established constitutional right.

The Fourteenth Amendment forbids government conduct that deprives "any person of life, liberty, or property without due process of law."[151] Due process has two major meanings: first, substantive due process may require courts to void certain types of government action that infringe on individual rights and individual freedom of action; second, procedural due process may require the government to assure that individuals are afforded certain procedures before they are deprived of life, liberty, or property. [152] Although the plaintiffs do not specify which prong of the due process clause TDHS is supposed to have violated, I can infer fi:om their amended complaint and summary judgment response, and in

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[148] *Id.* at ¶¶ 74 & 85.

[149] *Id.* at ¶ 77.

[150] *Id.* at 79-82 & fns. 77 &78.

[151] U.S. CONST. amend. XIV.

[152] *See Frazier v. Garrison I.S.D.* 980 F.2d 1514, 1528 (5th Cir. 1993) (citing *United States v. LULAC*, 793 F.2d 636, 647 (5th Cir. 1986)).

particular the allegations stated above, that they are asserting a violation of their procedural due process rights.

The procedural due process clause requires that once it has been determined that an employee has a protected interest in continued employment, that employee must be given notice and an opportunity to be heard prior to termination,[153] "Notice and an opportunity to be heard," however, does not require the level of due process associated with a court of law. This principle simply requires "some kind of hearing," as appropriate to the nature ofthe case, prior to the discharge of an employee who has a constitutionally protected property interest in his employment.[154] In evaluating whether an employee was afforded sufficient due process prior to termination, the court must strive to balance the competing interests at stake: the private interests in retaining employment against the governmental interest in the expeditious removal of unsatisfactory employee and the avoidance of administrative burdens, and the risk of an erroneous termination. [155]

In the instant ease (assuming that both plaintiffs have established a property interest in continued employment), it is

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[153] *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *Loudermill v. Cleveland Board of Education*, 470 U.S. 532, 542 (1985).

[154] *See Perry v. Sindermann*, 408 U.S. 593, 599 (1972); and *Barry v. Barchi*, 443 U. S. 55, 65 (1972) (no due process violation where horse trainer whose license was suspended "was given more than one opportunity to present his side of the story").

[155] *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

undisputed that Segura was never terminated, and in fact has confnued his employment with TDHS to this date. Regarding his demotion, the sunmmry judgment record amply supports the conclusion that Segura received sufficient notice and an opporunmity to be heard through the agency's administrative grievance procedures. For instance, both Segura and Garcia gave statements to the agency investigator.[156] Once the investigation concluded, Program Manager Manley reviewed the investigator's report and made the recommendation to demote Segura into a non-supervisory position. Manley's recommendation to demote Segura was based on her good-faith belief that he had violated TDHS Work Rule 4710, §§ B-4 & B-12.[157] Upon receiving the demotion recommendation, Segura invoked TDHS' administrative grievance procedures to challenge it. First, he requested a management conference, which was granted. At the management conference, Segura, represented by counsel, was afforded the opportunity to present his side of the story to TDHS' management. After the management conference, however, TDHS affirmed its decision to demote him. At that point, Segura was afforded the opportunity to appeal the decision in a formal administrative hearing before an ALJ. Segura (again, with the assistance of counsel), as well as Garda, testified at the hearing. At the hearing, Garcia recanted his earlier version of the incident previously given in a written statement to the agency's investigator, by testifying under oath that Segura had no involvement in the placement of the computer icons and accepting full responsibility for the offense. Importantly, upon being questioned at the hearing whether his earlier statement

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[156] Docket entry 92, at 19 & Manley's Affidavit, Tab. I.

[157] *Id.*

implicating Sc'gm had been in any way been eoerexxt by TDHS, or whether he had attempted before the hearing to correct his earlier false statement, Gareia answered in the negative. Based on C, arcia's hearing testimony, the ALI found that TDHS' decision to demote Segura was erroneous and should be reversed.[158] Shortly after the hearing, TDHS reinstated Segura to the same pay he was earning as a supervisor prior to his demotion.[159]

According to the uneontradieted summary judgment evidence submitted by defendants, it appears that TDHS has attempted, on at least two occasions, to enter into settlement agreements with Segurm These settlement agreements would have provided Segura with back pay as compensation for the higher income he would have earned as a supervisor as compared to the salary he earned for six months in the lower non-supervisory position.[160] Also, according to defendants, the settlement offers would have restored Segura to a supervisory position.[161] Segura has, nonetheless, rejected both settlement offers and is currently employed by TDHS as a CBA Worker W, although he is paid at the same supervisory level he held prior to his demotion.[162] Clearly, under these facts, Segura's procedural due process claim cannot stand.

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[158] Docket entry 92, at 9; and docket entry 93, Segura's Affidavit.

[159] Docket entry 92, at 9.

[160] *Id.* & Affidavits of Billa (Tab. 4) & Manley (Tab. 1).

[161] *Id.*

[162] *Id.*

With respect to Garcia, the record is undisputed that he received a three-day suspension for his involvement in the placxment of the inappropriate computer icons.[163] It was only after he testified at the administrative hearing that his earlier written statement implicating Segum was false, that TDItS made the decision to terminate his employment. Unlike Segura, it appears that Garcia did not invoke the TDHS' administrative grievance procedure available to him to challenge his termination. Because Garda testified under oath that his written statement was false, there was no risk of an erroneous termination. Moreover, TDHS also believed that the interest in terminating aa employee such as Garcia, who had violated agency policy by providing a false written statement causing another employee a demotion, was compelling.[164]

In addressing plaintiffs' allegations on the interpretation of the computer icons by TDHS, it is important to note that even if TDHS had no basis for finding the computer icons inappropriate or in violation of agency work rules, as plaintiffs contend, TDHS' alleged failure to follow its own policies and procedures does not necessarily constitute a violation of plaintiffs' due process rights. [165] Thus, even if plaintiffs can establish that defendants acted in violation of an agency rule or policy, plaintiffs must prove that their due process rights were violated. The only facts plaintiffs state in

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[163] Docket entry 82, Manley's Affidavit (Tab. 1).

[164] *See Eldridge*. 424 U.S. at 335; and docket entry 92, at 20 and Mason's Affidavit (Tab. 7) and Billa's Affidavit (Tab. 4).

[165] *See Levitt v. University of Texas at El Paso*, 759 F.2d 1224, 1230 (5th Cir.), *cert. denied*, 106 S.Ct. 599 (1985).

support of this argument is their own disagreement with TDHS' interpretation of the icons. In that regard, plaintiffs believed that the icons were not inappropriate as they were meant to facilitate or "bring home" to another co-worker the concept of developing computer icons with "creative" titles to store work related documents. It is well-settled that plaintiffs' personally-held beliefs do not raise a genuine issue of material fact.[166] Based on the summary judgment record, plaintiffs do not dispute the titles of the icons.[167] The undisputed evidence also demonstrates that female employee who discovered the icons, Dolores Torres, was offended by them.[168] The undisputed evidence further shows that as soon as Torres reported the icons to management, that TDHS began a prompt investigation of the incident.[169] There is no competent summary judgment evidence to refute TDHS' bona fide position that its interpretation of the computer icons as "inappropriate" for the workplace under its rotes and policies was legitimate and that the discipline imposed on Segttra and Gareia was commensurate with the gravity of the offense.

Further, there is no evidence on the record strpporting plaintiffs' allegations that the internal investigation and the administrative hearing were unfair. Segura's assertions that he

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[166] *See Hornsby v. Conoco, Inc.*, 777 F.2d 243, 246 (5th Cir. 1985).

[167] *See* Docket entry 93, at 23-24; docket entry 92, Hans' Affidavit (Tab. 3) & Jones' Affidavit (Tab. 5).

[168] Docket entry 92, Torres' Affidavit (Tab. 2) & Jones' Affidavit (Tab. 5).

[169] ***Id.***

should have been approached first before TDHS began the official investigation of the incident is insufficient to establish that TDHS violated its own procedures or that it violated Segura's due process rights. Both plaintiffs participated in the formal investigation of the incident and were given the oppommity to channel their employment disputes through TDHS' administrative grievance procedures. The only action that was unfair in this case was committed by Gamia when he admittedly provided a false written statement implicating Segura in the incident and causing his demotion.

Because it is my opinion that plaintiffs cannot establish that their procedural due process fights were violated by the defendants, pursuant to 42 U.S.C. § 1983, there is no need to address the qualified immunity defense asserted by the named defendants, in their individual capacities. Accordingly, defendants' motion for summary judgment (docket entry 92) on plaintiffs' § 1983 claim should be *granted*.

VII. Recommendation

Based on the foregoing, I recommend: (1) that defendants' motions to dismiss plaintiffs' claims under 42 U.S.C. §§ 1981 & 1983 against TDHS and the named defendants, sued in their official capacities (docket entries 44 & 92), be **GRANTED** based on their Eleventh Amendment immunity and this court's lack of subject-matter jurisdiction to address the same;, (2) that defendants' motions to dismiss plaintiffs' claims under 42 U.S.C. §§ 1982 & 1985(2) (docket entries 43, 88, 56 & 89), be **GRANTED**, as plaintiffs have not pleaded any facts that would support their claims for relief under these statutes; (3) that the individually-named defendants' motion for judgment on the pleadings with respect

to their individual liability under Title VII (docket entry 95) be **GRANTED**; (4) that defendants' motion for summary judgment on plaintiffs' substantive claims against TDHS under Title VII, and against the named defendants sued in their individual capacities under 42 U.S.C. § 1981 (docket entries 95 & 92, respectively), be **GRANTED**, as plaintiffs have failed to allege facts sufficient to entitle them to relief such that there is no genuine issue of material fact under the applicable legal standards; and (5) that the named defendants' motion for summary judgment on plaintiffs 'equal protection and procedural due process claims brought against them in their individual capacities under 42 U.S.C. § 1983 (docket entry 92), be GRANTED, as plaintiffs have failed to establish a violation of a well-established constitutional right.[170]

VIII. Instructions For Service And Notice 0f Right to Object/Appeal

The United States District Clerk shall serve a copy of this Memorandum and Recommendation on each and every party either (1) by certified mail, return receipt requested, or (2) by facsimile if authorization to do so is on file with the Clerk. According to Title 28 U.S.C. § 636(b)(1) and FED. R. CIV. P. 72(b), any party who desires to object to this report must serve and file written objections to the Memorandum and Recommendation within 10 days after being served with a copy unless this time period is modified by the District Court. A party filing objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections;

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[170] In addition, I hereby **DENY** the following non-dispositive motions: docket entries 27, 53, & 86.

the District Court need not consider frivolous, conclusive or general objections. **Such party shall file the objections with the Clerk of the Court, and serve the objections on all other parties and the Magistrate Judge.** A party's failure to file written objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a *de novo* determination by the District Court.[171] Additionally, any failure to file written objections to the proposed findings, conclusions and recommendations contained in this Memorandum and Recommendation within 10 days alter being served with a copy shall bar tho aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by tho District Court.[172]

SIGNED this 14 day of February, 2001.

/s/_____
NANCY STEIN NOWAK
United States Magistrate Judge

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[171] *See Thomas v. Arn*, 474 U.S. 140, 149-152 (1985).

[172] *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996).